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CURRENT EVENTS.

UNIFORMITY OF STATUTE LAW—NEGOTIABLE PAPER — MR. FINKELNBURG'S REPORT. — It may not be ultra-patriotic to say so, but the English have a manifest advantage of us in the comparative uniformity of their statute law. They have one great legislature possessed of plenary powers and utterly untrammelled by constitutional limitations; while we have forty odd legislatures, each circumscribed by State constitutions or the organic law of Territories, and all subject to the inhibitions of the constitution of the United States. The consequence is an infinite diversity of statutes affecting all matters of legislative cognizance. The *varium et mutabile* of Virgil is as descriptive of the statute laws of the States of this union as it is of the dear delightful creatures to whom the poet first applied it.

We are led into this line of thought by the perusal of Mr. Finkelnburg's report to the National Bar Association on a subject of much interest and importance, the "negotiability of promissory notes." After a succinct, but very clear exposition of the rules of general commercial law affecting the subject, he portrays vividly, accurately and in sufficient detail, the statute law of the several States and Territories relating to the negotiability of promissory notes, and the numerous and vital discrepancies between them, and submits to the association the question: What remedy can be found or made for the evils which these discrepancies occasion to the commerce of the country and the due administration of the law? It is undeniable that these discrepancies cause much confusion, loss and unnecessary litigation, and it is equally true that the discrepancies increase as the legislative mills annually or biennially grind out new amendments and modifications. The consequent evils also increase as the lines of commerce extend and business relations among the States multiply.

The States of this union are, politically,

"distinct as the billows, but one as the sea;" commercially they are "one as the sea," without being "distinct as the billows." State lines are, in a commercial sense, emphatically imaginary lines, and the name of a State has become that which Napoleon, in the plentitude of his power, once called Italy, then a province of his vast empire, "a geographical expression."

Of course, it is hardly necessary to point out wherein a note negotiable under the law merchant differs from one which is merely assignable. The latter, in the hands of an indorsee, is subject to every defense which the maker could have made against it in the hands of the original payee. The former must be for a definite sum of money without condition, and in the hands of an indorsee who has received it for value in due course of trade and before maturity, entitles the holder to full payment, according to its tenor and effect, regardless of all defenses of which he had no previous notice.

These simple rules have been modified by statute in many of the States—in one, Mississippi—no promissory notes are negotiable at all; in another, none are negotiable which have not been indorsed to a bank; in others, a note is not negotiable if the words "without defalcation" are omitted; and in still others, the omission of the words "for value received" is fatal to the negotiability of a promissory note. All these variations of the general rule of law are unreasonable, if not silly. For instance, when a sane and solvent man promises in writing under his hand to pay a definite sum of money, the presumption is that he has received for his note what he, at least, considers value, and why, by omitting those words "for value received," should he be permitted to lay a trap for an unwary indorsee?

There can be no doubt that all these modifications of the law merchant should be swept away, but whether it can be done, or how, is a question of much difficulty. To commit the whole subject of negotiable paper to congress would require a constitutional amendment, which, in our opinion, could not be carried, for it would be vehemently opposed, and with some justice, as a movement in the direction of centralization, unnecessary and hazardous. To induce State legislatures to retrace their steps, undo their

own work or that of their predecessors, and to do so with such unanimity as to answer any valuable practical purpose will, we fear, be found a task of exceeding difficulty, and probably *ultra vires* of bar associations. The average legislator so frequently thinks that he "knows it all" that it is quite difficult to lead him into a new path, and especially in a retrograde direction.

If the bar associations shall undertake the task of systematizing and rendering uniform in all the States the law of negotiable paper, we wish them the fullest success, warning them of the difficulty before them.

SPECIAL LEGISLATION.—It seems that the legislature of the State of Ohio is not the only body of that description which gives a very latitudinarian construction to the obligation of constitutional duty. A correspondent in Dakota[1] calls our attention to a statute enacted by the legislature of that Territory, which is very similar in character to those Ohio statutes upon which we commented some weeks ago.[2]

It may be remarked that in a Territory of the United States an act of congress is as obligatory upon the legislature of the Territory as the constitution of a State is upon the legislature of that State. Such an act of congress is the "higher law" and often the organic law of the Territory, and an act of the legislature which violates it is as inefficient as an act of congress, which is in violation of the constitution of the United States. It is a high and manifest duty of courts of last resort, whenever such violations have been brought to their attention, to set the seal of reprobation upon them, by declaring such acts to be absolutely void.

[1] See *post*, p. 252.
[2] 27 Cent. L. J. 81.

NOTES OF RECENT DECISIONS.

TRUST — EXPRESS TRUST — RESTRICTIONS UPON ALIENATION.—In an able and well considered opinion the Maryland Court of Appeals has decided a case[1] involving the question whether in conformity with public policy a testator may give to the object of his bounty an equitable interest in real property for life, and exclude all claims of creditors or purchasers from him. The facts were, that the testator devised certain lands to a trustee, directing him to pay the income thereof into the hands of his (testator's) son, and not to any other person claiming either as creditor or assignee. The court reviews all the decisions on the questions, English and American. It finds that the rule established in England is, that the restriction upon alienation is inconsistent with the nature of an equitable estate in lands and cannot be supported.[2] The weight of authority in the American courts is, however, on the other side. The Supreme Court of the United States, speaking through Mr. Justice Miller, says:[3] "But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. * * * Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee."

The same doctrine has been fully sustained in Massachusetts.[4] Mr. Judge Morton says: "We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. * * * Under our system, creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

[1] Smith v. Powers, Md. Ct. App., June 12, 1888; 14 Atl. Rep. 497.
[2] Brandon v. Robinson, 18 Ves. 429; Rochford v Hackman, 9 Hare, 480; Graves v. Dolphin, 1 Sim. 66; Green v. Spicer, 1 Russ. & M. 395; Young-husband v. Gisborne, 1 Colby, 400.
[3] Nichols v. Easton, 91 U. S. 725, 727.
[4] Bank v. Adams, 133 Mass. 170.

There is a similar ruling in Pennsylvania.[5] Judge Sharswood says: "That a benefactor has the power of thus restricting the enjoyment of his bounty through the medium of a trust during the life of the beneficiary is now the unquestionable law of the State."

In Vermont,[6] the same doctrine has been held; also in Connecticut[7] and in Kentucky.[8] In other States, however, the English rule has been followed.[9] The Maryland Court of Appeals very properly, in our judgment, declines to follow the English ruling, and holds that the restriction upon alienation by a testator is lawful, and that creditors can take anything, not exempt, which their debtor may possess, but cannot enlarge the scope of a testators bounty.

[5] Rife v. Geyer, 59 Pa. St. 393. See also Shankland's Appeal, 47 Pa. St. 113.
[6] White v. White, 30 Vt. 338.
[7] Leavitt v. Beirne, 21 Conn. 1.
[8] Pope v. Elliott, 8 B. Mon. 56.
[9] Tillinghast v. Bradford, 5 R. I. 205; Dick v. Pitchford, 1 Dev. & B. Eq. 480; Keath v. Bishop, 4 Rich. Eq. 46; Baille v. McWhorter, 56 Ga. 183; Rugely v. Robinson, 10 Ala. 702.

INSURANCE — MORTGAGE — MORTGAGEE — RELEASE. — The Supreme Court of New Hampshire recently has occasion to declare the right of a mortgagee to payment of a policy of insurance upon the mortgaged property.[1] The facts were, that Hall mortgaged the property in question to Woodman, and the defendant issued a policy of insurance in favor of Woodman "as her interest may appear." After the loss Hall, without the knowledge or consent of Woodman, had a settement of the policy with the defendants, and the matter was referred to referees, who found the loss to be an amount less than the sum due to Woodman on the mortgage. Defendants claimed that Woodman was concluded by this award, but the court held that she was not, saying: "It is not material whether Woodman could or could not maintain an action in her own name against the defendant. If she brings suit in the name of Hall, her interest, as the real plaintiff, will be as fully protected as if she were the plaintiff of record.[2] The policy might have been avoided by Hall's breach of its conditions, because such was the contract,[3] but, at the moment of the loss, the rights of the parties were fixed. Whatever amount was secured by the policy, to the extent of the mortgage debt, was due to Woodman. To her the defendant was bound to pay it. Hall could not release the defendant from its obligation, nor defeat Woodman's right. He could no more adjust the amount of the loss than he could release it.[4] Woodman, not being a party or privy to the reference, is not concluded or affected by the award.[5]

[1] Hall v. Fire, etc. Co., S. C. N. H., March 16, 1888; 13 Atl. Rep. 648.
[2] Scoby v. Blanchard, 3 N. H. 175, 176; Cameron v. Little, 13 N. H. 23; Webb v. Steele, *Id.* 230, 239; Duncklee v. Mill Co., 23 N. H. 245; Jordan v. Gillen, 44 N. H. 424; Folsom v. Insurance Co., 59 N. H. 54.
[3] Baldwin v. Insurance Co., 60 N. H. 164.
[4] Harrington v. Insurance Co., 124 Mass. 126, 131; Brown v. Insurance Co., 5 R. I. 394, 399; Browning v. Insurance Co., 71 N. Y. 509.
[5] Mahagan v. Mead, 63 N. H. 130.

THE RIGHT OF ONE RAILWAY COMPANY TO CONDEMN THE PROPERTY OF ANOTHER RAILWAY COMPANY UNDER A GENERAL STATUTORY POWER.

II.

(*Continued from p.* 207, *vol.* 27.)

We come next to cases in which a railway company has sought to condemn property already devoted to a public use, although not railway property. Crossing cases are omitted.

Illinois & Michigan Canal Trustees v. C. & R. I. R. Co., decided in 1853,[1] was a suit by the Canal Trustees to enjoin the railway company from building its road over the canal lands and right of way. The latter proceeded under a general power of condemnation contained in its charter. With regard to the right of way 90 feet wide on either side of the canal, the court said: "Nor are defendants prohibited from constructing their road within 90 feet on either side of the canal. No such prohibition is found in defendant's charter; nor does it appear that this 90 feet is necessary to the free navigation or for the enlargement of the canal."

St. Louis, etc. R. Co. v. Institution for the Education of the Blind,[2] was a proceeding by a railway company to condemn for depot purposes, under a general power of condemnation contained in its charter, a portion of

[1] 14 Ill. 314.
[2] 43 Ill. 303.

the grounds owned and used by the State for an institution for the blind. The court held that the land in question was not subject to condemnation. The evidence showed that the land was not necessary to the railway company, and that it was valuable, if not essential, to the State for the purpose to which it was devoted.[3]

Indiana Central R. Co. v. State,[4] was a suit by the trustees of a State asylum for the deaf and dumb to enjoin the railway company from constructing its road across the lands of that institution. The court took a different view of the necessities of the institution and of the railway from that taken by the Supreme Court of Illinois in the case of the institution for the blind just cited, and denied the injunction. The facts were somewhat different however. The charter of the railway company fixed its general direction in addition to fixing its *termini*. The court said: "We cannot so construe the charter as to say that the company are required to diverge from such a line in order to pass around an intervening tract of land, because the title is in the State, and to locate their road wholly on private property."

Re N. Y. Central, etc. R. Co. v. Gas Co.,[5] was a proceeding by the railway company to condemn under the general railway act of New York, land of the gas company adjoining its works, not in present use, but which might become necessary to it if certain improvements were made. The court said: "There is nothing in the charter of the appellant (the gas company) which exempts it from the power of eminent domain, as exercised under the statute in acquiring real estate. Its land is not held by virtue of any such right, nor is it required to serve any public use, which confers upon it any special privilege in this respect." The court authorized the proposed taking.

Re N. Y., Lackawanna, etc. R. Co.,[6] was a proceeding by a railway company to condemn under a general power land of a steamboat company for the erection of terminal warehouses by the railway company. The charter of the steamboat company permitted it to assume public duties, *e. g.* those of a common carrier, but did not oblige it to do so. The court allowed the proposed taking. In discussing the question whether the steamboat company held the land for such a use as to exempt it from condemnation the court said: "The test appears to be not what it (the steamboat company) does, or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it and so that it cannot be shaken off."

White River Turnpike Co. v. Vermont Central R. Co.,[7] was a proceeding by the turnpike company to enjoin the railway company from constructing its road in some places along, and at other places across, the turnpike. The charter of the railway company gave a general power to condemn and also expressly provided for the crossing of highways by the railway company upon restoring the same. There was no express statutory provision allowing a highway to be taken longitudinally. Nevertheless, the court refused to enjoin the railway company. It appeared from the evidence that the turnpike would not be materially injured by the proposed taking.

Inhabitants of Springfield v. Conn. River R. Co.,[8] was a suit by the town to enjoin the railway company from maintaining and using a track along a public highway. The railway company acted under a general statutory power to condemn property. The court said: "When it is the intention of the legislature to grant a power to take land already appropriated to another public use such intention must be shown by express words or by necessary implication. There may be such a necessary implication. Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object, and carries with it such incidental powers as are requisite to its exercise. If, then, the exercise of the power granted draws after it a necessary consequence, the law contemplates and sanctions that consequence. Take the familiar case of the Notch of the White Mountains, a very narrow gorge, which

[3] This case, although decided in 1867, was decided without reference to the Illinois statute, passed March 9, 1867, exempting lands of State benevolent institutions from condemnation.

[4] 3 Ind. 421 (1852).

[5] 63 N. Y. 326 (1875).

[6] 99 N. Y. 12.

[7] 21 Vt. 590.

[8] 4 Cush. 63 (1849).

affords the only practicable passage for many miles through that mountain range. A turnpike road through it has already been granted. Suppose the gorge not wide enough to accomodate another road, but the legislature of New Hampshire, in order to accomodate a great line of public travel, should grant power to lay a railroad on that line, they would by necessary implication grant a power to take some portion of the road-bed of the turnpike." The court then say this is a proper case to be referred to commissioners to determine whether the construction of the railway on the street is necessary, and order such a reference. The opinion of the court correctly expresses the general rule, stated at the beginning of this article, so far as applicable to the facts before it. The court looking at the facts of the particular case, contemplated only such a taking of a highway as would destroy or materially injure it. The other branch of the general rule, namely, that property although devoted to a public use, if not essential to the proper exercise of such use, is subject to condemnation under a general power, was inapplicable, and therefore it was unnecessary to state it. In the next case cited the same court act on the latter branch of the rule and distinguish cases like the present.

Boston Water Power Company v. B. & W. R. Co.,[9] was a suit by the water power company to enjoin the railway company from constructing its road across a tidal water basin owned by plaintiff. Defendant proceeded under a general power to condemn property for its line of which the location of the *termini* was fixed by statute. The court said: "There is nothing, in the nature of the plaintiff's public works or in the public use to which they were applied, and the extent to which that use would be impaired or diminished by the taking of such part of the land as might be necessary for the location of this railroad from which the power of locating the railroad over it may be presumed to have been restrained by the legislature. Both uses may well stand together with some interference of the later with the earlier which may be compensated for by damages. In this respect, therefore, it differs from many of the cases put, where it is asked whether one canal, turnpike or railroad may be laid over the same line with a former one. Both cannot stand together and one must supersede the other. And this shall not be construed to be the intent of the legislature unless it appears by express words or necessary implication." The court decides for the defendant, the railway company.

We come next to cases in which a municipal corporation has sought to condemn railway property. The controlling principles are the same, whether the State is represented in the appropriation of property by a railway company or by a municipal corporation. Simple crossing cases are omitted.

Baltimore, etc. R. Co. v. North,[10] was an application by the railway company for an injunction to restrain drainage commissioners from proceeding under a general power of condemnation contained in the State drainage laws of Indiana, to construct a ditch longitudinally within the railway company's right of way for a distance of about a mile. The injunction was granted on the ground that the new use would be destructive of the old use, and that the property sought to be taken was not necessary to the petitioners.

New Jersey Southern R. Co. v. Long Branch Commissioners,[11] was a proceeding to widen a street. Commissioners on the part of the public sought to take a strip 37 feet wide and 550 feet long, from the side of the right of way, 60 feet wide, of the railway company. Here petitioners' grant of power was in general terms. The land was in actual use by the railway company in its business. The court in denying the application distinguished the cases in which the condemnation of a crossing has been allowed, under a general power, as follows: "Under a condemnation of a right to cross nothing will be acquired but a mere right of way, and the place of crossing will remain in common use of the parties for the exercise of their several franchises. The condemnation under such circumstances will *leave the franchises unimpaired.*"

Crossings.—Many of the States regulate the crossing of one railway by another by express statutory provisions. Cases decided under such statutes are omitted. The necessity of allowing crossings is so obvious that it is

[9] 23 Pick. (Mass.) 360.

[10] S. C. Ind., Nov. 4, 1885, 23 Am. & Eng. R. R. Cas. 36.

[11] 39 N. J. L. 28 (1876).

not surprising to find the courts holding that, in the absence of such express statutory regulation, a crossing may be obtained by condemnation proceedings under a general power to condemn, where the existence of the proposed crossing will not materially impair the defendant company's capacity to exercise its franchises.

Morris & E. R. Co. v. Central R. Co.,[12] was a case of this kind in which one company sought to build its railway across another company's railway. In the cases collected in the following note, a municipal corporation sought to build a street across a railway under a general power to condemn, but the principle involved is the same.[13]

One case from the peculiarity of its facts and the suggestiveness of the court's statement of the law, I will cite at length.

Re City of Buffalo,[14] was a proceeding by the city to condemn a right of way, 60 feet wide and two miles long, for a canal, across a railway company's yard filled with tracks and sidings in actual use and acquired under the power of eminent domain. The city charter gave it power to condemn land for streets, parks, canals and other corporate purposes in general terms. No necessity for the proposed appropriation appeared. The court in denying the petition said; "In determining whether a power generally given is meant to have operation upon lands already devoted, by legislative authority, to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, and the extent to which that use would be impaired or diminished, by the taking of such part of the land as may be demanded for the subsequent public use. *If both uses may not stand together with some tolerable interference*, which may be compensated for by damages paid, * * it is not to be implied from a general power, given without having in view a then existing and particular need therefor, that the legislature meant to subject lands, devoted to a public use already in exercise, to one which might thereafter arise." The court said further, *arguendo*, that a grant by special charter of a power of condemnation, in general terms, to build a road, between fixed *termini*, necessitating building the road through a narrow valley, would imply that power was given to take so much of a pre-existing highway as might be necessary, but that organization for the purpose of building between the same *termini*, under a general law containing a general power to condemn, would not give power to appropriate such highway, although the railway could not be built without such appropriation.[15]

In P. & P. U. R. Co. v. P. & F. R. Co.,[16] which was a proceeding by one railway company to condemn a right of way across the tracks and grounds of another railway company, it was held that the right to build an elevated track passing over a chute from defendant's elevator to boats on the Illinois river, where the chute would not be substantially interfered with, might be taken.

Longitudinal Joint Use.—In some States, as Massachusetts, express provision is made by statute by which one railway company may obtain a joint use of another company's railway longitudinally. The narrow construction which we have seen some Massachusetts decisions give to a power of condemnation expressed in general terms, may be due to the knowledge of the courts that these statutes are available to all. The joint use of passes and defiles in the Territories is secured to railway companies by federal statute.[17] In the absence of express statutory regulation there appears to be no reason why a longitudinal joint use not interfering materially with the exercise of defendant's franchises, if such a case should ever occur, may not be taken under a general power to condemn.

A statutory power to condemn property expressed in general terms is limited by an express exemption, although such exemption is contained in a separate statute previously enacted.[18]

[12] Morris & E. R. Co. v. Central R. Co., 31 N. J. L. 205.

[13] City of Hannibal v. Hannibal, etc. R. Co. (1872), 49 Mo. 480; Little Miami, etc. R. Co. v. City of Dayton, 23 Ohio St. 510; C., R. I. & P. R. Co. v. Town of Lake, 71 Ill. 333; Prospect Park R. Co. v. Williamson (1883), 91 N. 5. 552. *Accord:* Evergreen Cemetery Assn. v. City of New Haven, 43 Conn. 234; *Re* Rochester Water Commissioners (1876), 66 N. Y. 413.

[14] 66 N. Y. 167.

[15] *Accord:* Tuckahoe Canal Co. v. T. & J. R. Co., 11 Leigh (Va.), 43.

[16] 105 Ill. 110.

[17] Act of March 3, 1875, 18 Stat. at L. 482; R. Co. v. Alling, 99 U. S. 463; D. &. Cy. R. Co. v. S. P. R. Co., U. S. C. C. (Colo.), 14 Am. & Eng. Ry. Cas. 83.

[18] Village of Hyde Park v. Oakwoods Cemetery Association, 119 Ill. 141.

It is said in a number of the decisions cited, that property already devoted to a public use can be taken by condemnation proceedings only when such taking is authorized by statute expressly or by necessary implication. It is further held in the same decisions, that such implication may arise from the face of the statutes or from them and the facts of the case considered together. This rule is consistent with the rule stated at the beginning of this article, if we consider that the fact, that property sought to be condemned is not necessary to the owner for the proper exercise of the public purpose for which he holds it, raises the presumption by necessary implication that the legislature did not mean to protect it from appropriation.

The rule, that a statutory power to do enumerated acts implies a prohibition to do other acts, is of little assistance in arriving at the intent of the legislature where it has granted a general power and has also specifically regulated the doing of certain acts within the scope of that general power; for example, where it has given a power to condemn, expressed in gemeral terms, coupled with provisions regulating the appropriation of the whole of highways and streams longitudinally and of a joint use of highways, streams and other railways at single points. In such cases the legislature generally means to limit the general power by its specific directions so far only as it has expressly done so. This view of the law has been expressly adopted or silently acted upon in all the previously cited decisions in which the question was in issue, except in one Illinois case, namely, Illinois Central R. Co. v. C. B. & N. R. Co. In that it was held, that a general power, to condemn was limited by subsidiary statutory provisions giving the right to take highways and streams longitudinally and a joint use of highways, streams and other railways at single points, so as to exclude from the scope of such general power the right to take any considerable part of the right of way of another railway longitudinally.

The rule of construction, that a grant of power by the State to an individual or a corporation shall be construed strictly against the grantee is not applicable in determining the right of one railway company to condemn property already in the possessi n of another ailway company, because both hold under similar grants from the State and are exercising special privileges.

In applying the general rule stated in italics at the beginning of this article, the very important question arises: Who is to decide what property is necessary to the defendant railway company for the proper exercise of its franchises? In all the cases which recognize such general rule the question is assumed without discussion to be judicial in its character and the court trying the case decides it. Upon the kindred question —who is to decide how much property, subject to condemnation, the petitioning railway may take—the Supreme Court of Illinois,[19] in a proceeding by a railway company to condemn private property not devoted to a public use, said: "Every company seeking to condemn land for a public improvement must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose. This right, of course, is subordinate to all statutory and constitutional restrictions on the subject, and also to the further limitation that the courts of the State, which are authorized to entertain applications of this character, are clothed with ample power to prevent any abuses of this power by such companies. For instance, if in an obscure villiage a railway company, in the exercise of this limited right to judge for itself as to the amount of land necessary for its purposes, should attempt to condemn forty or twenty acres of land for depot purposes, this would clearly be an attempted abuse of the right, and the court to whom the petition was referred would be fully warranted in denying the application."

Milwaukee & St. P. R. Co. v. City of Fairbault,[20] was a proceeding by the railway company to enjoin the city from opening a street through plaintiff's depot grounds. The city acted under a general power to open streets. On the question as to what body or tribunal should decide upon the necessity of the proposed taking by the city, the Supreme Court of Minnesota said: "It is claimed by defendant that the city council in this case

[19] Smith v. C. & W. I. R. Co., 105 Ill. 511. Right of court in which condemnation proceeding is prosecuted to correct abuse by petitioner, of its discretion to appropriate property reaffirmed: C. & E. I. R. Co. v. Wiltse, 116 Ill. 449; Sholl v. German Coal Co., 118 Ill. 427.

[20] 23 Minn. 107 (1876).

was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the necessity and expediency of laying out highways is exclusively a legislative and not a judicial question. This is undoubtedly a correct rule as applied to the legislature itself and also to a municipal body, when acting within the conceded limits of its delegated powers. But when as in this case the jurisdiction of the inferior tribunal over the particular subject-matter depends, not upon an express grant of power but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive on the courts."

In the absence of decisions directly in point, the decisions and considerations just presented furnish a guide in determining the body which is to decide what property the defendant railway company may hold exemptfrom condemnation.

A court having to pass ultimately upon the needs both of the petitioning railway company and the defendant railway company can hardly avoid considering the comparative as well as the absolute wants of the petitioner and defendant. An examination of the cases cited shows that this has been done in almost every instance. The general rule stated in italics in the early part of this article is therefore subject to the limitation imposed by such custom.

RUSSELL H. CURTIS.

SPECIFIC PERFORMANCE—CONSIDERATION—STATUTE OF FRAUDS—PART PERFORMANCE—ELECTION—LOSS OF DEVISE.

HUNTER V. MILLS.

Supreme Court of South Carolina, June 26, 1888.

1. *Specific Performance—Consideration — Statute of Frauds— Part Performance.* — Where a testator verbally agrees with his nephew that, if the latter will purchase and improve certain lands he will pay the purchase money for the nephew, and the nephew makes the purchase and improvements, leaving his own land and taking possession of that purchased, there is a valuable consideration, with part performance, sufficient to take the case out of the statute of frauds, and equity will enforce specific performance against the devisees, who cannot justly claim that the nephew's creditors have been thereby defrauded.

2. *Election.*—The nephew is not required in such case to elect between such land and his share as distributee of the intestate property of the testator.

3. *Descent and Distribution — Loss of Devise — Heirs not Compelled to Make Good.*—The devisee of land which the testator was under obligation to convey to another cannot, upon loss thereof, compel the heirs to make it good out of property as to which the testator died intestate.

MCGOWAN, J., delivered the opinion of the court:

William Mills, late of the county of Laurens, departed this life in July, 1885, seized and possessed of a considerable estate, real and personal. He was never married, but left collateral heirs. He left a will by which he disposed of only part of his estate, dying intestate as to the remainder. Among the property including in his will was a small tract of land (81 1-4 acres) known as the "Landford Land," which he devised to his "friend John A. Mills," who claimed as devisee. John P. Hunter, a nephew and one of the heirs at law of William Mills, was then and had been living on the land for several years (certainly since 1881), and cultivating it as his own. He claimed that the testator, William Mills, in his life-time made with him a verbal agreement that if he (Hunter) would purchase the Landford place, and improve it by clearing and ditching certain low grounds on it, he (Mills) would pay the purchase money for the benefit of the said Hunter. He claimed that he had, at great expense and trouble, performed his part of the agreement, and instituted this proceeding against the said John A. Mills, named as devisee, and Robertson, the surviving executor, and the other heirs of the said testator, William Mills, for specific performance of the said agreement. The defendants, and especially John A. Mills, to whom the land was devised, made vigorous defense. He interposed a verbal demurrer that the complaint did not state facts sufficient to constitute a cause of action; and, that being overruled, he denied that the testator had made any such agreement, but, if so, it was not such agreement as the court would require to be specifically performed. It was referred to the master, C. D. Barksdale, Esq., "to hear and determine the issues of law and of fact." He took the testimony, which is all printed in the brief, and made a clear and condensed statement of the facts, as follows: "(1) About December, 1879, William Mills agreed verbally with John P. Hunter that if he (the said Hunter) would purchase of John Landford a certain tract of land, take possession of and improve and cultivate the same, that he (Mills) would pay the purchase money, and thereby give him the land; (2) that the consideration moving the said Mills to this agreement was the natural affection he bore the plaintiff, who was his nephew, the particular interest which he took in his welfare, and a desire to assist him in procuring such land as would 'produce corn,' since the land he owned was mainly suitable for the production of cotton; (3) that the said plaint-

iff, under this agreement, and induced by this promise, made the contract of purchase with Landford at $15 per acre for the land, paid the said Landford $50 to 'bind the trade,' for which he took a receipt of Landford as 'received of William Mills,' went into possession of the land, and has improved it at considerable expense, enhancing its value to such an extent that it is now worth from $35 to $50 per acre; (4) that these improvements were made by the plaintiff with the knowledge and approval of said Mills, who, at various times while the work of improvement was progressing, stated to different persons that he had given the land to his nephew, the plaintiff, to enable him to make the corn which was necessary for bread for his family, and he hoped he would succeed; (5) that a deed for the property was made by the said Landford to the said Mills on January 10, 1881, which was recorded on February 16, 1881; (6) that the said plaintiff has paid the taxes on the land since the purchase, and has held the undisputed possession thereof ever since his entry thereon under the parol agreement aforesaid, except that the defendant John A. Mills attempted to take possession thereof about November, 1885, by entering thereon for the purpose of sowing grain, which the plaintiff forbade and protested against," etc. Upon this state of facts the master recommended that the plaintiff should have his decree for specific performance, and that the court should order titles to be made to him. The cause came up, on exceptions to this report, before Judge Norton, who confirmed the report, and ordered the master, in behalf of all the parties to the action, to execute title of the land to the plaintiff; and "that Toliver Robertson, as executor of the will of William Mills, deceased, do pay the costs of the plaintiff, and of all the defendants, out of the estate of his testator, the said William Mills." From this decree the defendants John A. Mills and Toliver Robertson, as executor, appeal to this court upon the following exceptions: "(1) His honor erred in not holding that the complaint did not state facts sufficient to constitute a cause of action—First, in not setting forth a valuable consideration flowing from the plaintiff; second, in setting forth an alleged gift or agreement which would operate as a fraud upon plaintiff's creditors. (2) His honor erred in holding that William Mills agreed to give the land described in the complaint to John P. Hunter. (3) His honor erred in holding that a parol gift of land is enforceable by action for specific performance on behalf of a collateral kinsman, upon a meritorious consideration. (4) His honor erred in not holding that plaintiff had been reimbursed for any improvements he may have made upon said land. (5) His honor erred in holding that the doctrine of election did not apply in this case. (6) His honor erred in holding that John A. Mills was not entitled to compensation out of the undivided estate of William Mills, deceased. (7) His honor erred in decreeing that the costs be paid out of the estate of William Mills," etc.

1. In reference to the demurrer that the complaint did not state facts sufficient to constitute a cause of action for specific performance, the objection seems to be double—First, in not setting forth a valuable consideration flowing from the plaintiff; and, second, that equity will not order specific performance of any contract the object of which was to defraud the creditors of the person seeking performance. It seems to us that the complaint does allege valuable as well as good consideration, in that Hunter undertook to contract for the land, to leave his own place and take possession of it, and to improve it by clearing and ditching the low grounds, etc. Besides, it should not be overlooked that there is a class of engagements, involving promises to convey property, which are enforceable in equity—"where a party makes a declaration in order to acccomplish a particular purpose, and secures what he desires by means of such representation." "If a benefit has been conferred as the consideration for any act, a party who knowingly accepts that benefit, though he may not be bound by an actual contract or a condition of performance annexed to the gift, is compellable in equity to do the act." See Adams, Eq .*79; McKeegan v. O'Neill, 22 S. C. 460, and authorities. It may be that the enhanced value which Hunter added to the land by his improvements was equitably his property, and as such liable for his debts; but we cannot clearly see how that should be an obstacle in the way of specific performance at the instance of Hunter. The whole purchase money of the land was paid by the testator, Mills, which could be no fraud on the creditors of Hunter. There are no creditors of Hunter objecting. The delay in making title to Hunter was the act of Mills, and not of Hunter, who is now invoking the aid of the court to require the representatives of Mills to do now what he insists should have been done before.

2. The master found, as matter of fact, that the testator, Mills, agreed with the plaintiff that if he would purchase the land, take possession of it, and improve and cultivate the same, he (Mills) would pay the purchase money in Landford's notes, and thereby give him (Hunter) the land, and that the plaintiff, under this declaration, and induced by this promise, performed his part of the arrangement. The circuit judge concurred in this; and, under the well-established rule of this court, it must be considered as established, unless the finding is without evidence to support it, or is against the manifest weight of the evidence. We have read the evidence carefully, and we cannot say that the finding is either without evidence or against the weight of it.

3. But, assuming that such an arrangement was made, the agreement was in reference to land, and only verbal; and it is insisted that such a parol gift of land is not enforceable by action for specific performance on behalf of a collateral kinsman upon a meritorious consideration. True, the promise was as to land, and rested in parol,

but there is nothing in that fact alone which must stand in the way of its being specifically performed, if in all other respects it is of a character proper for such relief. The real objection indicated is the statute of frauds, which requires all contracts as to land to be in writing. But it is almost as familiar as the statute itself that part performance of a given character will take a case out of the statute of frauds. The doctrine is thus stated, in condensed form, by Mr. Pomeroy: "A verbal contract for the sale or leasing of land, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds. The ground upon which the remedy in such cases rests, is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute. * * * The acts of part performance, therefore, in order to satisfy this principle, must be done in pursuance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and those combined," etc. 3 Pom. Eq. Jur. § 1409, Mims v. Chandler, 21 S. C. 480.

It is further urged, however, that it was a gift only upon meritorious consideration, and the court will not order specific performance of a contract which is purely voluntary and without valuable consideration. To this rule there are some well-established exceptions, but we think it unnecessary, and would probably tend to confusion, to go into that subject now. We have already endeavored to show that this is not a case of the kind indicated, but that there was such valuable consideration as a court of equity will recognize. It is true that in the promise made by the testator, Mills, there was generosity. He had no wife or children. Hunter was his nephew —of the class of kindred nearest to him in blood —and doubtless he felt an "interest" in him on that account. But, while the arrangement was generous to his nephew, it was also practical, being founded on a valuable as well as a good consideration. In Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 668, the court say: "The court of equity will always enforce a promise upon which reliance is placed, and which induces the expenditure of labor and money in the improvement of land. Such a promise rests upon a valuable consideration. The promisee acts upon the faith of the promise. We can perceive no important distinction between such a promise and a sale. Courts would sanction wrong and fraud not to sustain such a promise," etc. In Hardesty v. Richardson, 44 Md. 617, 22 Am. Rep. 61, the court say: "It is alleged and abundantly proved that large expenditures were made in permanent improvements upon the land, with the knowledge of the father, and which were induced by and made upon the faith and in consideration of the father's promise to convey the land. This constitutes a good equitable consideration, which courts of equity will protect and enforce. In such a case the court relies, not so much on the contract, which falls within the statute of frauds, as on the acts done under it subsequently on the faith that the promise will be performed by the other party. When, therefore, a gift has led to the expenditure of money or labor on the land given, in making permanent improvements of considerable extent, the gift becomes irrevocable in equity, as it would operate a fraud on the donee to allow the donor to avoid the performance of his undertaking," etc.

But if specific performance is decreed, and the land given to the plaintiff, thereby defeating the attempted devise of it to John A. Mills, it is ingeniously urged upon us that Hunter should be required to elect between the Landford land or its equivalent in value of his share as distributee of the intestate property of the testator, William Mills, which should go to John A. Mills in lieu of his lost devise. Hunter takes nothing under the will, and we agree with the circuit judge that the facts do not raise a case of election. There are wanting "two inconsistent or alternative gifts, with the intention, either expressed or implied, that one shall be the substitute of the other." If Hunter's distributive share of the intestate property had been given to him by the will, instead of going to him under the law, he might possibly have been required to elect. "The fundamental doctrine is that, in order to create the necessity for an election, the donor must give to B some property wich belongs to A, and must at the same time give to A some property of his own." See 1 Pom. Eq. Jur. § 469, and notes.

Nor do we think that all the heirs together are required to make good the lost devise to John A. Mills. If the testator, Mills, had not attempted to dispose of the Landford land, but it had descended to Hunter and the other heirs as intestate, we can understand how John A. Mills might have made the claim that, to the extent of Hunter's interest in the land descended, his claim for the land itself should be regarded as *pro tanto* "satisfied." But the testator, Mills, undertook to convey the land away from the heirs; and their interest, as such, is precisely the same whether it goes to the plaintiff, Hunter, or to John A. Mills. The distributees do not hold under the will, but by the law of inheritance, and we are not aware of any principle of law in this State which makes it obligatory on them to "compensate" John A. Mills for his lost devise. It seems to us that, somewhat like an "adeemed" legacy, it must simply go out of the will.

Costs in equity are largely within the discretion of the circuit judge as a part of the relief granted. The judgment of this court is that the judgment of the circuit court be affirmed.

NOTE.—1. It has been held that specific performance of a contract will not be decreed as a matter of course, but only in the exercise of a sound legal discretion.[1]

[1] Seymour v. Delancy, 3 Cow. 445; s. c., 15 Am. Dec. 270.

Where, however, the contract is "in its nature and circumstances unobjectionable," it is as much a matter of course for courts of equity to decree a specific performance of it, in a proper case, as it is for courts of law to give damages for the breach of it.[2] The following requisites are stated by Mr. Adams to be essential to the exercise of this branch of their jurisdiction by courts of equity: 1. Performance *in specie* must be necessary. 2. It must be practicable. 3. The contract must rest on a valuable consideration. 4. Its terms must be certain. 5. It must be reciprocal.[3] The only one of these requisites alleged to be wanting in the principal case, the third, namely, a valuable consideration. And upon this point, it would seem, both upon reason and authority, to be rightly decided, although there is some conflict among the authorities upon the general subject of the consideration necessary to render a contract capable of being enforced by a decree of specific performance.

The rule is often stated broadly, that a valuable consideration is necessary, and that the remedy of specific performance "cannot be obtained for a merely voluntary agreement."[4] And it is undoubtedly true, as a general rule, that a mere voluntary contract, without any consideration, will not be specifically enforced by a court of equity.[5] But contracts founded merely on a meritorious consideration, as distinguished from a valuable consideration, have often been enforced.[6] Thus, in the leading case of Ellis v. Nimmo,[7] a post-nuptial agreement by a father, making provision for his child, was specifically enforced as resting upon a meritorious consideration.[8] In order to be sufficient, however such a consideration can extend only to a wife or child, and not to collateral kin.[9] And, notwithstanding these decisions, it may well be doubted, whether, under the later authorities, a merely "good" or "meritorious" consideration, unaccompanied by acts or circumstances of such a character that a refusal to enforce specific performance would operate as a fraud upon the party seeking it, can be sufficient.[10]

If the consideration is, in any legal sense, valuable, mere inadequacy will not necessarily prevent specific performance from being enforced. The older authorities seem to have held otherwise in cases where the inadequacy was sufficient to make the bargain or contract hard or unconscionable.[11] But the prevailing rule now is, that mere inadequacy will not of itself prevent the enforcement of specific performance, except as it may, under the circumstances of the case, be conclusive evidence of fraud.[12]

As to what is sufficient to constitute a valuable consideration requiring specific performance of the contract, there is also some conflict in the decided cases, several of which are very similiar in their facts to the principal case. Thus, in a number of cases it has been held that a parol gift of lands or agreement to convey or devise them to another, if the latter will take possession and make improvements thereon, when followed by such possession and improvements, is supported by a valuable consideration, and so far executed as to be taken out of the statute of frauds.[13] And such gifts and promises have often been specifically enforced as against the heirs and devisees of the person who made them.[14] So, in many cases, verbal contracts and promises to dispose of property in a particular manner by will have been upheld and specifically enforced upon similiar considerations.[15]

On the other hand, it has been held in Alabama that a promise by a father to give a plantation to his son if he would remove thereto from another State, is a mere gratuity, and will not be specifically enforced although the son did take possession thereunder and make improvements as well as incur expense and trouble in removing.[16] And in a recent case, it was held where a childless husband and wife, in consideration that a young girl should live with them and perform services as their own child, orally agreed to make her their heir and will her their entire estate, part of which was realty, that the agreement was within the statute of frauds, and was not taken out by part performance on the part of the girl.[17] So, in Pennsylvania, it has been held that improvements made by a child on the parent's land under a promise

per Savage, C. J. See also, to same effect, Bruce v. Tilson, 25 N. Y. 202; 2 Story Eq. Jur. § 742, and authorities cited in note.

[2] 2 Story Eq. Jur. § 751; Hall v. Warren, 9 Ves. 608; King v. Hamilton, 4 Pet. 311, 328; Cabeen v. Gordon, 1 Hill Ch. 51; Hale v. Wilkinson, 21 Gratt. 80; Brewer v. Herbert, 30 Md. 301; s. c., 96 Am. Dec. 582.

[3] Adams' Eq. 77. See also Wagreblast v. Whitney (Oreg.), 6 Pac. Rep. 399; Seymour v. Delancy, 3 Cow. 445; s. c. 15 Am. Dec. 270; Anderson v. Green, 7 J. J. Marsh. 448; s. c., 23 Am. Dec. 417, and note, 423; Rider v. Gray, 69 Am. Dec. 135, note, 140.

[4] Pomeroy on Contracts, § 54; Adams' Eq. 78.

[5] Shackleford v. Handley, 1 A. K. Marsh. (Ky.), 496; s. c., 10 Am. Dec. 753; Curlin v. Hendrichs, 35 Tex. 225; Cochrane v. Willis, 34 Beav. 359; Houghton v. Lees, 1 Jur. (N. S.) 862; Butnam v. Porter, 100 Mass. 337; Anderson v. Green, 23 Am. Dec. 417, and note, 426.

[6] See Shepherd v. Bevin, 9 Gill (Md.), 32; Mahan v. Mahan, 7 B. Mon. (Ky.) 579, 582; Dennison v. Gochering, 7 Pa. St. 175, 179.

[7] Lloyd & Goold, 333, per Sugden, Ld. Ch.

[8] See, however, Vice-Chancellor Shadwell's criticism on this case in Holloway v. Headington, 8 Simons, 325. And see also Jefferys v. Jefferys, 1 Craig & Ph. 138, 141.

[9] Buford's Heirs v. McKee, 1 Dana, 107; Hayes v. Kershaw, 1 Sandf. Ch. 258.

[10] See Burkholder v. Ludlum, 30 Gratt. 255; s. c., 32 Am. Rep. 668, opin. 669, 670; Wood v. Thornly, 58 Ill. 464; Wallace v. Rappleye, 103 Ill. 229; Taylor v. Staples, 8 R. I. 170; s. c., 5 Am. Rep. 556; 1 Story Eq. Jur. § 793, and authorities cited in notes; Dugan v. Gittings, 3 Gill, 138; s. c., 43 Am. Dec. 306; Keffer v. Grayson, 76 Va. 517.

[11] See Frye on Spec. Perform. *129, and cases cited; Seymour v. Delancy, 3 Cow. 445; s. c., 15 Am. Dec. 270; Chitherall v. Ogilvie, 1 Desau. Eq. 250; Clement v. Reid, 9 S. & M. 535.

[12] Frye on Spec. Perform. *129, *130; Coles v. Trecothich, 9 Ves. 246; Cathcart v. Robinson, 5 Pet. 263; Rodman v. Zilly, Saxton, 320; Viele v. Troy, etc. R. Co., 21 Barb. 381; Parmelee v. Cameron, 41 N. Y. 392; Lee v. Kirby, 104 Mass. 420; Bean v. Valle, 2 Mo. 126; White v. McGannon, 29 Gratt. 511; Osgood v. Franklin, 7 Am. Dec. 513, and note.

[13] Freeman v. Freeman, 43 N. Y. 34; s. c., 3 Am. Rep. 657; Burns v. Fox, 113 Ind. 265; Atkinson v. Jackson, 8 Ind. 31; Peter v. Jones, 35 Iowa, 512; Young v. Glendenning, 6 Watts, 509; s. c., 31 Am. Dec. 492; Gupton v. Gupton, 47 Mo. 37; Dozier v. Matson (Mo.), 7 S. W. Rep. 268; s. c., 26 Cent. L. J. 490; Langston v. Bates, 84 Ill. 524; s. c., 25 Am. Rep. 466.

[14] Kurtz v. Hibner, 55 Ill. 514; s. c., 8 Am. Rep. 665; Hiatt v. Williams, 72 Mo. 214; s. c., 37 Am. Rep. 438. Dower interest of the widow will not prevent a decree for specific performance subject thereto: Hall v. Hall (Ill.), 16 N. E. Rep. 896.

[15] Johnson v. Hubbell, 2 Stockt. Ch. (N. J.) 332; s. c., 66 Am. Dec. 773; Shakespeare v. Markham, 10 Hun, 311; Sutton v. Hayden, 62 Mo. 101. See also Pfugar v. Pultz, 26 Cent. L. J. 502, and many authorities cited in note, 504.

[16] Forward v. Armstead, 12 Ala. 124; s. c., 46 Am. Dec. 246. See also, to same effect, Pinchard v. Pinchard, 23 Ala. 649; Rucker v. Abell, 8 B. Mon. 566; Adamson v. Lamb, 3 Blackf. 446; Taylor v. Staples, 8 R. I. 170.

[17] Wallace v. Long, 105 Ind. 522.

that he should have it at his father's death, will not take the case out of the statute of frauds.[18]

As a general rule, in order to withdraw a parol contract from the operation of the statute of frauds and render it capable of being enforced by specific performance, the following circumstances must concur: "1. The acts of part performance must be such as are not only referable to an agreement such as that alleged, but such as are referable to no other title. 2. They must be such as render it a fraud in the defendant to take advantage of the contract not being in writing. 3. The agreement to which they refer must be such as in its own nature is enforcable by the court. 4. There must be proper evidence of the parol agreement, which is let in by the acts of part performance."[19]

Where the contract is once taken out of the statute of frauds by the delivery of possession and the making of improvements, the right to specific performance is not lost by a temporary cessation of possession under circumstances evincing an intention not to surrender that right.[20]

2. "*Election* is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both."[21] The doctrine of election in its application to heirs and devisees, is based upon the real or supposed intention of the testator that the legatee or devisee shall surrender some right in exchange for his legacy.[22] "To originate this doctrine, two things are said to be essential: 1. That the testator shall give property of his own. 2. That he shall profess to give also the property of his legatee or devisee."[23] Or, as stated by Mr. Pomeroy, "the donor must give to B some property which belongs to A, and must at the same time give to A some property of his own."[24] And "there never can be an implied election, but upon a presumed intention of the testator."[25]

These are the general rules ordinarily governing the doctrine of election, and they might, perhaps, be construed as limiting its application to cases in which the inconsistency is shown entirely by the instrument itself by antagonistic provisions therein, and as thus lending support to the principal case. But the doctrine is also applicable to an heir at law,[26] and it has been held that the testator's intention, if certain, may be gathered from the State of the property as well as from the purview of the will.[27] Judge Story, in treating this subject, gives an illustration that seems to ignore the distinction drawn in the principal case. It is this: "If a testator, having an absolute power to dispose of an estate, should devise it to his heir; although in such a case, the heir would take by descent, and the devise be inoperative, whether he admitted or disputed the will; yet, as to another estate of the heir, which was disposed of by the testator in his will without title, he would be put to his election. * * * The estate, descending to the heir under an election made by him to claim against the will, ought to be subject in his hands to the same implied condition as if he had taken it by devise."[28] The testator in the principal case would surely be presumed to have known that his nephew, as his heir, would get a portion of the estate as to which he died intestate as certainly as if he had expressly devised it to him in the will, and by devising to another that which he had already given to his nephew, he would seem to have evinced a clear intention that the nephew should not have both. Although the principal case is somewhat different from the ordinary cases in which the doctrine has been applied, its applicability to that case may be urged with plausibility, if not with justice.[29]

W. F. ELLIOTT.

18 Poorman v. Kilgore, 67 Am. Dec. 425; s. c., 26 Pa. St. 365. See also note to McGarvey v. Roods, 26 Cent. L. J. 184, 186.

19 Frye Spec. Perform. *174. See also, for illustrative cases generally, Wright v. Pucket, 22 Gratt. 374; West v. Bundy, 78 Mo. 407; Gallagher v. Gallagher (W. Va.), 5 S. E. Rep. 297, and note; Steele v. Grimes (Minn.), 37 N. W. Rep. 445; Everett v. Dilley (Kan.), 17 Pac. Rep. 661; Clark v. Clark (Ill.), 13 N. E. Rep. 553; Christy v. Barnhart, 53 Am. Dec. 538, and note; "Specific Performance of Parol Contracts Relating to Lands," 15 Cent. L. J. 166.

20 Drum v. Stevens, 94 Ind. 181. As to the effect of lapse of time on the right to specific performance, see leading article in 26 Cent. L. J. 283; also 22 Cent. L. J. 100; Cutsinger v. Ballard (Ind.), 17 N. E. Rep. 206.

21 Story Eq. Jur. § 1075.

22 Long v. Wier, 46 Am. Dec. 51.

23 Battle, J., in McQueen v. McQueen, 2 Jones Eq. 16; s. c., 62 Am. Dec. 205, citing Adams' Eq. 93, and Wilson v. Arny, 1 Dev. & B. Eq. 376.

24 1 Pom. Eq. Jur. § 469.

25 Beall v. Schley, 2 Gill (Md.), 181; s. c. 41 Am. Dec. 415.

26 Beall v. Schley, *supra*; Smith v. Goodman, 2 Vern. 586; Blunt v. Clitherow, 10 Ves. 593.

27 Blake v. Bunbury, 4 Bro. Ch. 24.

28 2 Story Eq. Jur. § 1094. See also Beall v. Schley, *supra*. But compare City of Philadelphia v. Davis, 1 Whart. 509.

29 See, however, Bisph. Princ. Eq. § 302.

CHANGE IN CHARACTER OF TRUST FUND—ACTION ON EXECUTOR'S BOND—MISAPPROPRIATION—INTEREST—RATE.

CRANSON V. WILSEY.

Supreme Court of Michigan, July 11, 1888.

1. *Change in Character of Trust Fund.*—An order of distribution alone cannot discharge an executor until the estate is distributed.

2. *Action on Executor's Bond—Misappropriation.*—A bequest was made to two infants, on condition that if either died it should go to the survivor, but not to become vested until he should arrive at his majority, and the fund to be invested by the executor in real estate mortgages and the income therefrom in like manner invested until such infant was of age. After an order of distribution was made one of the executor, with the other's consent, converted the fund to his own use. It was held that for such a conversion an action lay on their bond; for the order of distribution not having been obeyed, the character of their possession from that of executors to that of donees of a power was not changed.

3. *Interest—Rate.*—Where executors are directed to compound a fund, they will not be charged with compound interest unless it is clearly shown that they could have made the investment by the use of ordinary diligence, but they will be charged with simple interest at the rate of which they are required to make the investment.

Suit by Joel H. Cranson, judge of probate of Clinton county, for the use and benefit of David H. Rheubottom, against Armina Wilsey, James Franklin Mead, and James I. Mead uponan executor's bond. The direction for the investment of

the fund bequeathed to the Rheubottoms, mentioned in the opinion, is as follows; "I hereby order * * * that the part willed to my two grandchildren Rheubottom be by my executors placed at interest at a rate of interest equal to ten per cent. per annum, and secured upon real estate by mortgage security, such interest to be paid at least annually, and this interest invested in like manner, and, upon either attaining the age of twenty-one years, his just share or proportion to be paid to him." Judgment was entered for defendants, and plaintiff appealed.

CAMPBELL, J., delivered the opinion of the court:

This suit was brought on an executors' bond, given by the defendants Armina Wilsey and James Franklin Mead, as executors of David G. Wilsey, deceased, and Delos C. Wiley and James I. Mead as sureties. Wiley died several years ago. James I. Mead has died pending these proceedings in error. David G. Wilsey's will was probated January 23, 1871. He left to his widow, the defendant Armina Wilsey, a life interest in realty, and some personal property was also bequeathed to her. The residuary personal property, after providing for various matters, was to be divided so as to give half to his daughter Mary D. Fitz, and the remaining half, on certain contingencies, to the two children of a deceased daughter, Calvin W. and David H. Rheubottom, who were then small infants, and who took a residuary interest in land after the death of the widow. The bequest to these children was conditioned that in case either died it should go to the survivor, but not in any case to become vested until he should reach the age of 21 years. In case of death without issue before reaching that age, the property was given to others. This fund was to be invested, and the income reinvested, in real estate mortgages at 10 per cent. The education of these children was placed in charge of the executors, who were authorized to use so much of the income as should be allowed by the judge of probate. Calvin W. died without issue while a minor. David Henry Rheubottom was born December 7, 1869, and is still a minor. On May 20, 1872, the probate court ordered a division of personal property, without requiring its conversion into cash, and the executors were required to pay Mrs. Fitz certain securities amounting to $987.27 1-2, and to "take for the grandchildren of said deceased, Calvin Wilsey Rheubottom and David Henry Rheubottom," several notes and accounts, a reaper, and $314.12 in cash, making $987.27 1-2. Nothing further was done in the probate court until October, 1884, when John A. Sleight, guardian of David H. Rhuebottom, petitioned that the executors should account and file a new bond. This petition set up the death of Calvin, the insolvency of James F. Mead, the doubtful sufficiency of James I. Mead, and a fraudulent disposition of Armina Wilsey's property. The executors were cited to account, but failed to do so. A petition was then made for their removal, and for the appointment of an administrator. Upon the hearing they were removed, and Irving M. Eaton was appointed to act as administrator with the will annexed. Mr. Eaton then applied for leave to sue on the bond, and leave was granted. The breaches assigned are the conversion of the fund to Mead's own use, with the consent of Mrs. Wilsey, a failure to use the income to educate David, and a failure to account. The circuit judge found as facts, among other things, the order of 1872 for distribution, and a failure to invest the funds as required by the will, and its investment in real estate in the name of James Franklin Mead, by consent of Mrs. Wilsey. The court further found the probate action before mentioned which was not appealed from, but held that after the order of 1872 the executors did not hold the estate officially as such, but as donees of a power in trust, and that their sureties were not liable. It was held further, as matter of law, that the removal and other recent proceedings were not valid.

We do not think the conclusions of law are correct. An order of distribution alone cannot discharge executors until the estate is distributed. The Rheubottom children could not take the property, and inasmuch as their interest was contingent no one else could take it for them. The will required it to be invested by the executors. If the property had been invested in real estate securities as required, the question might have arisen whether this was not equivalent to such a compliance with the order of distribution as would have change the nature of their holding. Upon this question we express no opinion. It is at least a doubtful proposition. But we think it is a dangerous and incorrect doctrine that executors can discharge themselves of their official responsibility without doing some act to change the character of their holding, and place the fund safely where it ought to be. As the finding is that they did no such thing, but made a wrongful conversion of the property to the use of one of them, we think this was a clear breach of duty, for which action would lie on the bond. It is claimed, however, that this action was brought in the name and for the use of David Rheubottom, who has no definite interest. This is undoubtedly true, and the action should not have been for his use. But the leave was granted to the administrator, who is a proper party, and who is entitled to take the fund, and see that it is duly invested. Inasmuch as the judge of probate is the proper plaintiff, we see no reason why the record should not be so amended as to make it show the administrator as the party in interest, and it will be so done. The finding does not show that the fund could have been compounded at 10 per cent., and there is doubt whether it could have been. But interest computed in the ordinary way at 10 per cent. will make good the conversion, and will be allowed. This will fix the amount of the judgment at $987.27 1-2, with

interest to the day when the writ of error was issued. This seems to be the first suit on the bond. Judgment will be rendered *nunc pro tunc* as of that date for the penalty to be satisfied on payment of that amount, with costs of both courts against the executors and James I. Mead, inasmuch as it is, in our view, the legal effect of the finding of facts.

The other justices concurred.

NOTE.—"If one has two capacities in which to take and hold, and takes and holds without any declaration in which capacity he does so, he holds in that capacity in which he ought of right to take and hold."[1] But it is said that the rule does not hold in relation to money not identified and separated from other money by putting a mark on it.[2] This exception was disputed in a Tennessee case,[3] wherein it is held that funds held by an administrator, who is also guardian of the party entitled thereto, upon distribution, after the time has expired in which to settle the estate, are presumed to be in his hands as guardian, and the sureties on his administration bond are not liable therefor; and if the administrator, in such a case, has wasted the estate before the expiration of the time for settlement, that fact must be averred and proven. Following up this case, it was held that where an executor is also a trustee, and the two years allowed by statute from the settlement of the estate have expired, he holds as trustee merely, but such presumption may be rebutted.[4] Yet where the administrator is himself a distributee, the presumption, it seems, does not attach. "It is said that for two years after administration granted the administrator would be presumed to hold in that character, yet after two years the presumptions of law are reversed, and he is to be taken to have held as distributee. This legal postulate we do not think is established by the cases referred to for that purpose.[5] These will cases, where the administrator having also become guardian, being himself liable in both characters, his securities in the latter character, and not in the first, were held liable; not upon a presumption arising from operation of time merely, but from the act done, the assumption of guardianship and giving bond. It would be very unsafe, on the ground of such presumption, to permit a trustee receiving and holding property in that character to denude himself of the trust by the supposed operations of his own mind and will, and without any positive act done to apprise all interested of such a change of character."[6]

Where executors are made trustees of a fund arising from the estate, and have received the fund in contemplation of law as trustees, it is demandable from them only in that character.[7] Money in the hands of an executor, who is also a trustee, will be deemed to be held in the one character or the other, as will best subserve the purposes of justice.[8] If there has been a final settlement the balance is considered in his hands as guardian. It is an established principle of law that where the same person, who acts as the administrator of a deceased party, is appointed guardian to the representatives, that whatever balance is in his hands at the rendition of a final account (and perhaps even prior to that time), is in his hands and possession, not as administrator to the deceased, but as guardian to the representatives. This transfer is by operation of law. The administrator having in his hands a balance that ought to be paid over to the guardian, and one person representing both these characters, he cannot pay the money over to himself; nor, if the payment was refused, is there any person who could enforce it. Under these circumstances the law, by implication, considers it in the hands and possession of the party in that representative character that ought to receive it."[9] In another case the date of the attaching of liability as guardian is said to be from the time of the division of the estate between the heirs, and that subsequent receipts of parts of the income by the administrator will not relieve him.[10] In Ohio, it was held that if it becomes a person's duty, who is acting in the double capacity of administrator and guardian, to pay to himself as guardian a sum of money distributed to his wards, the law will presume such payment to have been made by him; but this presumption may be rebutted, and if he charges himself with the fund as administrator, but refrains from charging himself with it as guardian, the presumption of a transfer is rebutted, and in an action by his former wards on his bond as administrator for the recovery of the fund, he will be estopped to deny that he still holds it as administrator.[11]

So, it has been held that one acting in the capacities of executor and trustee must give bond as trustee before he can exonerate himself from liability as executor.[12] So, it is held that one acting as administrator and guardian cannot sue himself in his representative character, and the law will, the instant the money becomes payable, transfer it from one character to the other.[13]

In England, it would seem that if an executor assents to a specific legacy, or if he clearly sets apart to a particular legacy, he will be considered to hold the fund as a trustee for the trust, and not as executor, when he is to hold part of the devised funds as a trustee.[14]

If an executor merely determines to hold certain property thereafter in trust for a certain legatee under the will, and takes no steps to set it aside, he will not

1 Harrison v. Ward, 3 Dev. (N. C.) 417.

2 *Id.*

3 "We do not perceive the reason of this distinction:" Carroll v. Bosley, 6 Yerg. 220; s. c., 27 Am. Dec. 460.

4 Porter v. Moores, 4 Heisk. 29.

5 4 Mason, 136; 6 Yerg. 219.

6 Ross v. Wharton, 10 Yerg. 192.

7 Trustees of Jacobs v. Bull, 1 Watts (Pa.), 370; s. c., 26 Am. Dec. 72. See Aston's Estate, 5 Whart. (Pa.) 241; Watson's Appeal, 6 Pa. St. 506.

8 Sweigart v. Richards, 8 Pa. St. 434.

9 Segar v. State, 6 H. & J. 162; 14 Am. Dec. 265.

10 Admrs. of Johnson v. Exrs. of Johnson, 2 Hill Ch. (S. C.) 277; s. c., 29 Am. Dec. 72.

11 Wilson v. Wilson, 17 Ohio St. 150; s. c., 91 Am. Dec. 125. See Taylor v. Deblois, 4 Mason, 131.

12 Hall v. Cushing, 9 Pick. 395; Door v. Wainwright, 13 Pick. 328; Newcomb v. Williams, 9 Met. 525; Conkey v. Dickinson, 13 Met. 51; Doggett v. White, 128 Mass. 398; White v. Ditson, 140 Mass. 351; s. c., 54 Am. Rep. 473; Perkins v. Moore, 16 Ala. 9.

13 State v. Hearts, 12 Mo. 365; s. c., 51 Am. Dec. 167, citing Watkins v. State, 2 G. & J. 220; Karr v. Karr, 6 Dana, 3; Admrs. of Johnson v. Exrs. of Johnson, cited *supra;* Walker v. Walker, 25 Mo. 376. A judgment in such an action is a nullity: Cleeve v. Cleeve, 3 South. Rep. 107.

14 Dix v. Burford, 19 Beav. 409; *Ex parte* Wilkinson, 3 Mont. & Ayr. 145; Willmot v. Jenkins, 1 Beav. 401; Phillips v. Munnings, 2 M. & Cr. 309; *Ex parte* Dover, 5 Sim. 500; Brougham v. Poulett, 19 Beav. 119; Byrchall v. Bradford, 6 Madd. 13. For additional American cases, see Hubbard v. Lloyd, 6 Cush. 522; DePeyster v. Clendening, 8 Paige, 310; Byron v. Wood, 2 McMull. (S. C.) 288; Hitchcock v. Bank of U. S., 7 Ala. 386; State v. Brown, 68 N. C. 554; Elliott v. Sparrell, 114 Mass. 404; Witter v. Duley, 36 Ala. 135.

escape his liability as executor.[15] If a defaulting trustee is entitled to a part of the trust, as next of kin to the deceased *cestui que trust*, he will be held to have paid himself, and the share standing to his account on distribution will be paid to the other *cestui que trust* to the amount of the defalcation.[16]

In North Carolina, after an examination of the case, the supreme court held: 1. In case of debtor and creditor, if the same person represents both, and is to pay and receive, the possession of assets which ought to be applied to the debts is, in law, an application. 2. If one be clothed with a double fiduciary capacity, and upon the full execution of the trust a remainder is due the other, which has been definitely and authoritively ascertained and is still in his hands, the law makes the transfer. 3. If the trust fund is not closed, even though a final account has been rendered, which has not been passed upon by a competent tribunal, the trust fund remains unchanged and is held as before. 4. If, by an unequivocal act, indicating his intent, the trustee elect to hold the fund in possession in another capacity, it will be held transferred.[17]

W. W. THORNTON.

[15] Miller v. Congdon, 14 Gray, 114.
[16] Jacobs v. Ryland, L. R. 15 Eq. 341.
[17] Ruffin v. Harrison, 81 N. C. 208.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION—Statute—Process—Foreign Judgment.—— By statute in New York a judgment may be rendered against all defendants in an action on a promissory note, although one of the defendants is a non-resident of the State and has not been served with process. Such a judgment is not a bar to an actton on that note, in Massachusetts, against such defendant who has not been served with process.— *Stone v. Wainwright*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 301.

2. ADMIRALTY—Jurisdiction.——A libel by the owner of three vessels constituting "one ship" against the cargo for demurrage arising from unreasonable detention by the consignee at the port of discharge, is within the admiralty jurisdiction of the district court.— *Brown v. Certain Coal*, U. S. D. C. (Mich.), May 4, 1888; 34 Fed. Rep. 913.

3. ADMIRALTY— Practice — Knowledge of Error. —— An owner libeling the cargo for demurrage and knowing the acts of the master and recognizing them, cannot object to the authority of the master and execute the bill of lading under which the cargo was carried, on the grounnd that the bill was made in the home port.— *Brown v. Certain Coal*, U. S. D. C. (Mich.), May 4, 1888; 34 Fed. Rep. 913.

4. ADVERSE POSSESSION — Ejectment — Instructions. ——In an ejectment action, where adverse possession is relied on as a defense, it is not error to instruct the jury that it is for them to decide whether adverse possession was established and was such as would secure the title, the court having indicated what constitutes adverse possession.—*Logan v. Friedline*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 343.

5. APPEAL — Bill of Exceptions — Conflicting Statements. —— In considering bills of exceptions, which contain conflicting recitals by counsel and by the trial judge, the court will be guided by the statements of the judge.—*State v. Young*, S. C. La., May 7, 1888; 4 South. Rep. 481.

6. APPEAL—Costs.—— No appeal lies to the Pennsylvania supreme court from a taxation of costs by the court of common pleas. — *Appeal of Orlison*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 326.

7. APPEAL—Effect—Injunction. —— The allowance of an appeal to the supreme court, on affidavit and bond from a final decree granting an injunction, does not have the effect of dissolving the injunction, and the lower court has the jurisdiction to punish a violation of such decree after the appeal.— *State ex rel. etc. v. Anheuser-Busch, etc.*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 781.

8. APPEAL—Evidence—Oral and Written. —— In considering the sufficiency of the evidence to sustain the verdict or finding of fact, the rule of decision is the same, whether the case was tried on oral or written evidence.—*McLachlan v. Branch*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 703.

9. APPEAL—Jurisdiction—Amount in Controversy.—— Where plaintiffs sue for $7,211, and defendants set up a counterclaim for $3,000, and the trial court finds $4,720 due plaintiffs and $2,766 due defendants on their counterclaim, and render judgment for the defense between those sums, viz., $1,954.58, the amount in dispute to determine appellate jurisdiction is the sum found to be due plaintiff, which being in excess of the jurisdiction of the St. Louis Court of appeals belongs properly to the supreme court.—*State ex rel. v. Singenfelder*, S. C. Mo., June 18, 1888; 8 S. W. Rep. 770.

10. APPEAL—Orders— Injunction. —— An order, containing a preliminary injunction, made without prejudice, restraining the officers proclaimed elected from exercising or attempting to exercise any of the functions or duties appertaining to their respective offices, pending proceedings in *quo warranto*, to determine finally upon the rights of the parties to such offices, is not appealable.—*State v. Westmoreland*, S. C. S. Car., June 19, 1888; 6 S. E. Rep. 847.

11. APPEAL — Practice — Filing Abstract. —— Where the appellant fails to file a statement of the case and abstract of the record, the supreme court will presume that the rulings of the trial court were correct, and will affirm the case. — *Long v. Long*, S. C. Mo., June 18, 1888; S. W. Rep. 766.

12. APPEAL—Review— Auditor — Assignment of Error

——The report of an auditor, if confirmed by the court, is in effect the verdict of a jury, and is conclusive as to facts, and where upon appeal the assignment of error relate only to such findings of fact the appeal will be dismissed.— *Appeal of McCarty*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 352.

13. APPEAL—Review — Question of Fact. —— The Supreme Court of Pennsylvania will not reverse the decision of a trial court upon a question of fact which has been decided by an auditor and his report affirmed by the trial court, unless the mistake is very clear. — *Appeal of Atkinson*, S. C. Penn , May 21, 1888; 14 Atl. Rep. 376.

14. APPEAL—Review—Record.——A ruling of the trial judge cannot be reversed, unless the bill of exceptions makes such showing of the facts and circumstances as will enable this court to decide that he erred. — *State v. Tiernan*, S. C. La., May 7, 1888; 4 South. Rep. 477.

15. APPEAL — Sufficiency of Evidence. —— The mere difference of opinion between court and jury will not warrant setting the verdict aside, but where the verdict is clearly wrong it should be set aside. — *Aultman v. Leahy*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 740.

16. APPEAL—Writ of Error. —— An order to produce books and papers is not such a judgment that a writ of error or an appeal will lie upon it. — *Lester v. Berkowitz*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 706.

17. APPEAL—Writ of Error— Absence of Counsel.—— When the sole counsel for plaintiff in a writ of error is prevented by sudden illness from being in court when the case is called, which is thereupon dismissed, it will be reinstated upon his motion made the same day. — *Moore v. Brown*, S. C. Ga., June 4, 1888; 6 S. E. Rep. 833.

18. ATTORNEY AND CLIENT — Summary Proceedings. —— Where one sues an attorney for money in his hands belonging to the plaintiff, and the defendant claims in answer that the money demanded is his fee for professional services rendered to plaintiff, and plaintiff in reply denies that defendant is or was his attorney: *Held*, that it was error in the court to order the payment of money by the attorney, because its summary jurisdiction does not attach unless the relation of attorney and client is established or admitted.— *In re Kennedy*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 397.

19. BASTARDY—Process. —— The process in bastardy cases is not limited to the township but extends throughout the county.—*Morris v. State*, S. C. Ind., June 19, 1888; 17 N. E. Rep. 598.

20. BROKERS—Shipments—Advances.——A purchased cattle with money advanced by B, which was repaid out of the sales of such cattle made by C to A's broker: *Held*, that if C knew of the agreement between A and B he could not apply any part of the proceeds of such sales to pay an old debt due from A to him, until A's drafts on him in favor of B were paid. — *Cordell v. Hall*, U. S. C. C. (Ill.), Dec. 27, 1887; 34 Fed. Rep. 866.

21. CARRIERS—Passengers—Contract — Consideration. ——The privilege accorded by a railroad company to an express messenger (of riding in the baggage car), he having a passenger ticket, is a sufficient consideration for his contract to absolve the company from all liability for personal injuries to himself, whether caused by negligence or otherwise.—*Bates Old Colony, etc. Co.* S. J. C. Mass., June 20, 1888; 17 N. E. Rep. 633.

22. CHARITIES— Charitable Uses — Parties — Jurisdiction.—— Where a testator bequeaths money to charitable uses, directing that three-fifths of it should be managed by three trustees chosen by one religious society, and two-fifths by two trustees chosen by another like society: *Held*, that upon the failure of the former society to choose its trustees the court had no jurisdiction to confirm the choice of the other two, or to enforce the trust. — *Safford v. Fogler*, S. J. C. Me., March 24, 1888; 14 Atl. Rep. 289.

23. CONSPIRACY—Boycotting—Injunction. ——A combination to deter persons from working for a particular party is a conspiracy. The parties so injured may have an injunction to prevent the conspirators from displaying in front of his premises a threatening banner.—*Sherry v. Perkins*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 307.

24. CONSTUTIONAL LAW—Police Power. ——The act of New York which prohibits persons who sell food from giving away any other article therewith is unconstitutional, and not within the police power of the State. — *People v. Gillson*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 343.

25. CONTRACT—Condition—Performance—Assignment. —— Where the assignee of a note agreed with the assignor, that if he could use the note he would pay the assignor a certain sum of money, and afterwards brought suit on the note together with several other causes of action and recovered judgment: *Held*, that the assignee was liable to the assignor for the sum of money which he had agreed to pay him. — *Michell v. Hartlep*, S. C. Ind., June 28, 1888; 17 N. E. Rep. 608.

26. CONTRACT — Construction — Parol Evidence. —— Terms of a contract by which certain quanties of lumber were ordered, and an answer accepting the terms so stated were held not to be such a written contract as to exclude parol evidence of what was the original verbal agreement between the parties. — *Holt v. Pse*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 389.

27. CONTRACTS—Public Policy—Patents.——In return for a license to make certain patented articles A agreed to recognize the validity of other patents owned by B and not to make any of them, not even after the patents ran out: *Held*, that the contract was against public policy.— *People M. Co. v. Gormully*, U. S. C. C. (Ill.), April 30, 1888; 34 Fed. Rep. 877.

28. CONTRACT—Public Policy— Restraint of Trade.—— One whose only business was to sell sand taken from his land, sold part of the land with a stipulation that the purchaser should not sell sand from it: *Held*, that such stipulation was not void as being in restraint of trade and contrary to public policy.— *Hodge v. Sloan*, N. Y. Ct. App., Oct. 28, 1887; 17 N. E. Rep. 335.

29. CORPORATION—Foreign Corporation—Statute.—— The statute of Massachusetts which requires that a vote of the stockholders of a corporation should authorize the transfer of its real estate, does not apply to the property held in that State by foreign corporations. — *Saltmarsh v. Spaulding*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 316.

30. CORPORATION— Railroad— Construction Company. —— Where a construction company subscribes to the stock of a railroad company and pays ten per cent. of its subscription it will be presumed in the absence of denial or proof to the contrary, that the construction company had the right to make the subscription. — *Rochester, etc. Co. v. Babcock*, N. Y. Ct. App., June 19, 1888; 17 N. E. Rep. 678.

31. COUNTERCLAIM — Jury Trial — Statute. —— Construction of New York statutes relative to counterclaims and the right to jury trials upon them. — *Mac Kellar v. Rogers*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 350.

32. COUNTIES — Board — Presumption. —— The presumption of law that a session of the county board was duly and legally held is not rebutted by the fact that no summons can be found. — *Torr v. State*, S. C. Ind., June 23, 1888; 17 N. E. Rep. 286.

33. COUNTIES — Indebtedness — Company Obligation. —— The provision in the Colorado constitution, that the indebtedness of a county shall not exceed a certain limit, is not confined to debts by loan, but does not apply to warrants issued for compulsory obligations, such as fees of witnesses and officers.—*Rollins v. Lake County*, U. S. C. C. (Colo.), May 7, 1888; 34 Fed. Rep. 845.

34. COUNTIES—Liability — Jurisdiction — Statute.—— Construction of Indiana statutes relative to the presentation of claims against counties, suits against them, and jurisdiction of the court with reference to such suits. — *Bass, etc. Co. v. Parke County*, S. C. Ind., June 15, 1888; 17 N. E. Rep. 593.

35. COURTS— Jurisdiction — Interest. —— Where the jurisdiction of a court was limited to $100 and the demand of the plaintiff was found to be $65.89 but the

interest raised the amount to about $100: *Held*, that the interest should be considered in deciding upon the jurisdiction of the court. — *Stone v. Hawkins*, S. C. Err. Conn., Jan. 13, 1888; 14 Atl. Rep. 297.

36. COVENANTS—Paramount Title — Purchase. —— A covenantee in Missouri, under a covenant of seizure, may at once, upon the hostile assertion of a paramount right or title, pay off or extinguish the right by purchase, and his measure of damages is the reasonable sum paid for such title. — *Schuelle & Q. L. Co. v. Barlow*, U. S. C. C. (N. Y.), May 8, 1888; 34 Fed. Rep. 853.

37. CRIMINAL LAW—False Pretenses — Letter —Venue. —— Upon a trial for obtaining goods by false pretenses, it appeared that the letter containing the false statements was written and mailed in Jasper county to a firm in St. Louis, which, relying upon the statement, delivered the goods in St. Louis to a railroad, consigned to the defendant: *Held*, that the crime was committed in St. Louis. — *State v. Lichliter*, S. C. Mo., June 4, 1888; 8 S. W. Rep. 720.

38. CRIMINAL LAW — Fornication — Separate Confessions. —— The confessions of the two defendants in a joint trial, though not made in the presence of each other, are admissible, and it is for the defendants to request an instruction that such confessions can only affect the party making them. — *Perigo v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 660.

39. CRIMINAL LAW— Homicide — Premeditation. —— Where defendant within half an hour of the homicide, for which he is on trial, and within a short distance from the place thereof, obtained a pistol from a third party by aiming his gun at him and compelling him to surrender it, such evidence is admissible as showing deliberation and premeditation in arming himself for an encounter with the deceased, and as a connecting part of the entire transaction.— *State v. Rider*, S. C. Mo., June 4, 1888; 8 S. W. Rep. 723.

40. CRIMINAL LAW—Homicide—Self-defense. —— One assailed by another must retreat unless retreat will endanger his safety, and must refrain from taking life, if there is any reasonable mode of escape. — *Morrison v. State*, S. C. Ala., June 11, 1888; 4 South. Rep. 402.

41 CRIMINAL LAW—Indictment—Duplicity—Verdict.— The objection of duplicity in an indictment comes too late after verdict. When a general verdict is returned on an indictment containing several counts, judgment may be entered on the verdict if any count be good. — *Babcock v. United States*, U. S. C. C. (Colo.), May 5, 1888; 34 Fed. Rep. 873.

42. CRIMINAL LAW — Jurisdiction. —— Judges of the courts of quarter sessions and of *oyer* and *terminer*, have power in Pennsylvania to act as committing magistrates. — *March v. Commonwealth*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 375.

43. CRIMINAL LAW — Larceny — Corroboration of Accomplice. —— In a case of larceny it was held that there was not sufficient corroboration of the testimony of an accomplice. — *Buchanan v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 665.

44. CRIMINAL LAW—Larceny— Description. —— Under Alabama law, an indictment charging the theft of a gold watch is sustained by proof of the theft of a watch of ten carrat gold, it appearing that such watches are commonly called gold watches, though not by jewelers. — *Pfuter v. State*, S. C. Ala., June 11, 1888; 4 South. Rep. 395.

45. CRIMINAL LAW—Larceny— Discovery. ——The act of the defendant charged with larceny, in leading his captors to the place where the stolen goods were concealed, is admissible, though it was preceded by an assurance that it would be best for him to tell all about it. — *Banks v. State*, S. C. Ala., May 28, 1888; 4 South. Rep. 389.

46. CRIMINAL LAW—Larceny—Penalty. —— On an indictment under Pen. Code Tex. art. 736, it is error to charge that, if the jury find the defendant guilty, they will assess his imprisonment at not more than one year's imprisonment in the county jail and a fine of not more than $500, since it omits to charge as to imprisonment without the fine. — *Irwin v. State*, Tex. Ct. App., June 9, 1888; 8 S. W. Rep. 681.

47. CRIMINAL LAW—Larceny — Possession of Property. ——When defendant, indicted for larceny, explains his possession of the stolen property by claiming that he borrowed it from the theif, the court should charge, that if the property was stolen by a third person, from whom defendant, knowing the facts, obtained it by his consent, they must acquit the defendant. — *Ferriandez v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 667.

48. CRIMINAL LAW — Murder — Time for Passion to Abate. —— In a murder case, whether a reasonable time had elapsed prior to the killing for the passion of the defendant to cool, is one fact for the jury, and the length of time necessary for cooling has never been made absolute by rule. — *State v. Garborough*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 474.

49. CRIMINAL LAW—Perjury—Jurisdiction of Court.—— When a party indicted for two murders has fled and been extradited for one and tried for the other without objection before a court having jurisdiction of the subject-matter, false testimony therein is ground for a charge of perjury. — *Cordway v. State*, Tex. Ct. App., March 7, 1888; 8 S. W. Rep. 670.

50. CRIMINAL LAW—Plea— Record. —— Where on appeal the record fails to show that at the trial any plea was made by, or entered for the defendant, the judgment will be reversed. — *McCarty v. State*, Tex. Ct. App., June 9, 1888; 8 S. W. Rep. 666.

51. CRIMINAL LAW — Refusal of Continuance — New Trial. ——In Texas, where in a perjury case a continuance has been properly refused for want of dilligence in procuring the absent witnesses, yet a new trial should still be granted, if the evidence adduced on the trial shows that the absent testimony would be material and is probably true.—*Cordway v. State*, Tex. Ct. App., March 7, 1888; 8 S. W. Rep. 670.

52. CRIMINAL LAW — Remarks of Counsel — Harmless Error.——Remarks of counsel for prosecution in argument, which are not strictly proper, if they are condemned by the court in the hearing of the jury, are not ground for reversal.—*McGill v. State*, Tex. Ct. App., June 2, 1888; 8 S. W. Rep. 661.

53. CRIMINAL LAW — Venue—Proof. —— Proof of the venue of an offense is essential to the sufficiency of a conviction. — *Leggett v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 668.

54. CRIMINAL LAW— Venue — Recalling Witness. —— Under Kentucky law, where there is evidence that the defendant is guilty of the crime, it is error to refuse to allow the State to recall a witness to show that the crime was committed within the jurisdiction, though the State had announced itself through with its evidence.— *Com. v. Patterson*, Ky. Ct. App., May 24, 1888; 8 S. W. Rep. 694.

55. CRIMINAL PRACTICE — Certiorari. —— Where the court, in a substituted indictment upon which the defendant has been acquitted, charges the same offense set forth in the information, a *certiorari* at the instance of the State does not lie and the case is at an end.—*Commonwealth v. Seemann*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 329.

56. DEDICATION—Public Uses—Streets—Trespass.—— One who sells a tract of land bounding it upon a strip reserved for a street, thereby dedicates that strip to public uses as a street, and neither he or those claiming under him can thereafter maintain trespass against persons entering upon the strip for street purposes.— *Heselton v. Harmon*, S. J. C. Me., March 15, 1888; 14 Atl. Rep. 286.

57. DEED — Delivery — Acceptance. —— Where one grantee sues another grantee for the same land to compel him to deliver the deed for record, the defendant answered that he had not been satisfied with the deed, and it appeared that he had retained it for ten years without objection and that payment of the purchase

money had been made: *Held*, that the plaintiff was entitled to the relief he sought, and that the referee was right in deciding that the deed had been delivered and accepted. — *Smith v. Cole*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 356.

58. DEED — Contingent Remainder — Conditional Fee. —A deed by which the grantor conveys to the grantee land upon condition that if she should die childless the land shall revert to the heirs of the grantor and vesting a power of sale in the guardian of the grantee, creates, not an estate tail, but a fee simple conditional; but as there were no persons in being when the grant took effect who were capable of taking a remainder, the effect of the grant was to vest in the grantee an absolute fee simple title.— *Outland v. Bowen*, S. C. Ind., June 12, 1888; 17 N. E. Rep. 281.

59. DISTRICT ATTORNEY— Prosecution—Power.—— As a general rule, a county attorney cannot institute a public prosecution in another county against the objection of the attorney general.—*Martin v. Hall*, S. C. Kan., June 8, 1888; 18 Pac. Rep. 472.

60. DIVORCE—Alimony—Public Policy— Dower — Statute. —— Where a wife pending her suit for divorce agreed with her husband to forego all claim for alimony in consideration of a sum of money to be paid part then, and the remainder when the divorce was granted: *Held*, that the agreement was against public policy made during coverture, and did not bar her right to dower under the statute of the State. — *Appeal of Leeley*, S. C. Err. Conn., March Term, 1888; 14 Atl. Rep. 291.

61. DOWER — Bar — Conviction of Crime. —— A wife who has been convicted and imprisoned for life for being an accessory to the murder of her husband, is not thereby barred of her right of dower. — *Owens v. Owens*, S. C. N. Car., May, 1888; 6 S. E. Rep. 794.

62. EASEMENT — Mining — Waiver. —— Where one grants the surface of land reserving the coal beneath it, and in the conveyance is a stipulation that the grantor shall do as little injury as possible to the surface, the acceptance of such conveyance is not a waiver of the right of the grantee to "surface support." — *Williams v. Hay*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 379.

63. EMINENT DOMAIN—Compensation—Mortgage.—— Circumstances stated under which it was held that the right to damages for the taking of land under eminent domain vested in the mortgage of such land. — *State I. etc. Co. v. Playford*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 355.

64. EMINENT DOMAIN— Compensation — Opinion.—— In condemnation proceedings for taking for a railroad a stip through a farm, it is proper to ask the witness what is the difference between the value of the farm without the railroad across it and its value with the railroad across it. — *Sigafoos v. Minneapolis, etc. R. R.*, S. C. Minn., June 18, 1888; 38 N. W. Rep. 627.

65. EQUITY—Practice—Accounting.—— Where a master's report stated that the defendant has leased lands fraudulently and received royalties on such leases, recommending an accounting by another master, and upon appeal his report was sustained: *Held*, that upon the second accounting the principles of equity practice should control, and that the defendant should account for the royalties received.— *Appeal of Tolles*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 394.

66. EQUITY—Practice—Jury. —— After a hearing and decree, reversed on appeal, the case being again set for hearing, an application for a jury comes too late. — *Blanchard v. Cooke*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 313.

67. EQUITY—Practice—Mistake— Waiver. ——Where, in an action on a written contract, defendants pleads that there was a mistake in the writing, but, does not pray for a reformation thereof, he waives his right to such reformation. — *Born v. Schrenkeisen*, N. Y. Ct. App., June 6, 1888; 17 N. E. Rep. 339.

68. ESTOPPEL—Deed—Certificate— Incumbrance —— A grantor of land cannot estop his grantees from denying the existences of incumbrances on the land by a certificate that such incumbrance is valid. — *Purdy v. Coar*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 352.

69. EVIDENCE — Books — Identification. —— A book produced by a defendant on a subpœna *duces tecum* is admissible in evidence without further identification.— *Woodstock I. Co. v. Reed*, S. C. Ala., July 14, 1888; 4 South. Rep. 369.

70. EVIDENCE — Deceased Person — Declarations — Ejectment — Statute. —— The statute of Connecticut, authorizing as evidence the declarations of a deceased person in actions against his representatives, does not apply to suit in ejectment between two of his grantees. — *Lockwood v. Lockwood*, S. C. Err. Conn., Dec. 1, 1887; 14 Atl. Rep. 293.

71. EVIDENCE—Deed Executed after Suit Brought. —— A tax deed, executed after the commencement of the action and not put in issue, nor mentioned by the pleadings, cannot be introduced in evidence on the trial of the case.—*Campbell v. Fulmer*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 493.

72. EVDENCE—Opinion — Experts. —— Witnesses not shown to be experts may testify to facts, although such facts appear to be opinions or conclusions of facts, if the subject-matter to which their testimony relates cannot be reproduced or described to the jury as it appeared to them at the time of its occurrence, and such opinions are founded upon facts such as men in general are capable of comprehending and understanding. — *Atchison, etc. R. R. v. Miller*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 486.

73. EXECUTION—Mistake—Sale— Description. —— An execution sale of land cannot be declared void because of an error in the published notice, if the levy under which the sale takes place and the conveyance correctly describes the land. — *Hollcraft v. Douglass*, S. C Ind., June 12, 1888; 17 N. E. Rep. 275.

74. EXECUTORS—Interpleader.——Pending his appeal from a decree of a probate court ordering a special administrator to pay funds in his hands to the general administrator, the special administrator filed a bill asking that the general administrator and the executrix of the widow of their intestate be required to interplead to determine which estate was entitled to the funds: *Held*, that having appealed he was not entitled to the bill of interpleader. — *Atkinson v. Flannigan*, S. C. Mich., June 15, 1888; 38 N. W. Rep. 655.

75. EXECUTORS—Paying Claims—Account. ——Where in an action by a partner against the executor of his deceased partner to have an account taken and judgment for what is due him, it appears that the latter has a residuary balance in his hands nearly equal to what is due the plaintiff, and is chargeable for a much larger sum for the sale of realty of the estate, plaintiff's claim should be satisfied at once out of the assets in the executor's hands.—*Dickerson v. Wilcoxon*, S. C. N. Car., May 18, 1888; 6 S. E. Rep. 774.

76. EXECUTORS AND ADMINISTRATORS — Accounting — Pleading.——A complaint by an administrator against his predecessor paying for an accounting, stating that defendent had received money for the land of his intestate, had refused to pay it over to the plaintiff, and still held it in his hands, states a good cause of action.— *Lindley v. State*, S. C. Ind., June 23, 1888; 17 N. E. Rep. 611.

77. EXECUTOR AND ADMINISTRATORS—Domiciliary Administrators — Ancillary Administrators. —— A domiciliary administrator appointed in Maine is a necessary party to an appeal appointing another person ancillary administrator in Massachusetts.—*Martin v. Gage*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 310.

78. EXECUTOR AND ADMINISTRATORS—Fraudulent Conveyance. —— An administrator *de bonus non*, who has obtained a judgment on the bond of his predecessor, may proceed to subject to the payment of his judgment land which his predecessor had fraudulently conveyed, and this without having issued execution on the judgment against the defendants therein. — *Duffy v. State*, S. C. Ind., June 27, 1888; 17 N. E. Rep. 615.

79. EXECUTOR AND ADMINISTRATOR — Partnership —

Sale. —— The fact that the purchaser at an administrator's sale is the partner of the intestate, and that the purchase inures to the benefit of the firm, does not invalidate the sale. — *Appeal of Leeper*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 331.

80. EXECUTORS AND ADMINISTRATORS — Settlement — Setting Aside — Attorney's Fees. —— The final settlement of an executor or administrator may be set aside for fraud or illegality, and the allowance of attorney's fees to an administrator for his personal services is such an irregularity as will authorize the setting aside of the settlement.—*Pollard v. Barkley*, S. C. Ind., June 15, 1888; 17 N. E. Rep. 294.

81. FRAUD — Sale of Land — Representations. —— Though a vendee relies and acts upon the false statement of the vendor of real estate as to the title, he can recover, in an action for the fraud, though he also acts upon the vendor's assurance that he will be responsible for the title, the title standing in another. — *Reynolds v. Franklin*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 636.

82. FRAUDS — Statute of Frauds. —— Where a piano was sold upon condition that it should be fully tested and part of the price was paid, and the contract was afterwards rescinded and the money paid refunded: *Held*, that the second contract was not an independent contract nor within the statute of frauds.— *Wulschner v. Ward*, S. C. Ind., June 16, 1888; 17 N. E. Rep. 275.

83. FRAUDS—Statute of Frauds — Auctioneer — Memorandum.——The memorandum of an auctioneer which does not state the name of the owner of the property does not satisfy the statute of frauds.—— *O'Sullivan v. Overton*, S. C. Err. Conn., Dec. 1, 1887; 14 Atl. Rep. 300.

84. FRAUDS—Statute of—Brokers— Commissions.—— Agreements for commissions for the services of a real estate broker do not come within any possession of the statute of frauds. — *Waterman R. E. Ex. v. Stephens*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 685.

85. FRAUDULENT CONVEYANCE — Husband and Wife — Statute. —— In Indiana, by statute, the question of fraudulent intent in making a conveyance is a question of fact. Circumstances stated under which a conveyance by husband and wife was held not to be fraudulent, it appearing that no actual fraud was committed and the husband's means of paying his debts were ample. — *Phelps v. Smith*, S. C. Ind., June 27, 1888; 17 N. E. Rep. 602.

86. FRAUDULENT CONVEYANCE—Judgment — Statute.— Construction of New York statutes relative to fraudulent conveyances; when a question of fraud is a question of fact under those statutes. Circumstances stated under which the court refused to set aside, after the lapse of two years, a judgment and the sale made thereunder on the ground that the same were fraudulent.—*Inglehart v. Thousand, etc. Co.*, N. Y. Ct., App., June 5, 1888; 17 N. E. Rep. 358.

87. GARNISHMENT.——Where one pays money to the sheriff upon garnishment or trustee process, and the sheriff absconds before judgment is rendered, the loss falls upon the plaintiff, whose only remedy is on the sheriff's bond.—*In re Dawson*, N. Y. Ct. App., June 19, 1888; 17 N. E. Rep. 668.

88. HIGHWAYS—Notice—Assessment—Statute.——Construction of Indiana statutes relative to the laying off of highways and gravel roads, assessments to construct the same and the notices to be given in such cases.— *Wells County v. Gruver*, S. C. Ind., June 14, 1888; 17 N. E. Rop. 290.

89. HUSBAND AND WIFE—Separate Estate.—— Where a married woman purchased land and paid for it without any aid from her husband, who was insolvent: *Held*, that his creditors had no valid claim on the land against her heirs.—*Pate v. Carney*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 327.

90. HUSBAND AND WIFE—Slander—Statute. —— Construction of New York statutes relative to the right of married women to sue, defend, or appear separate from their husbands or other persons. Where a married woman is sued for slander her husband must be joined as a party defendant.—*Fitzgerald v. Quann*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 354.

91. HUSBAND AND WIFE—Trust—Resulting. —— Where a husband buys land, takes the title in his own name, pays for it out of his wife's separate estate, holds it for five years and then conveys it to her: *Held*, that as against his creditors he held the property under a resulting trust in favor of his wife.—*Hay v. Martin*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 333.

92. INDEMNITY — Telegraph Company — Notice. —— When the receiver of a telegraphic message sues the sender for damages sustained by a word omitted from the message and recovers, such sender can only recover the cost of the message from the telegraph company, which made the mistake, though he had notified the company to appear and defend.—*Pegram v. Western U. T. Co.*, S. C. N. Car., May 24, 1888; 6 S. E. Rep. 770.

93. INJUNCTION—Jurisdiction—Foreign Government.— An injunction to restrain a person within the jurisdiction of the court from interfering with property or asserting title thereto in a foreign country will not be granted, when asked on the ground that certain acts of the officials of the foreign government creating defendant's title to the property are void.—*Marshall v. Tumbull*, U. S. C. C. (N. Y.), April 16, 1888; 34 Fed. Rep. 827.

94. INJUNCTION —Water-courses — Logging. —— The owner of a mill on a stream may enjoin others who have made dams on the stream above him to run logs, thereby depriving him of water at times and others overflowing his dam, on one occasion sweeping away his mill, which accident might occur again at any time. —*Koopman v. Blodgett*, S. C. Mich., June 15, 1888: 38 N. W. Rep. 649.

95. INSOLVENCY—Allowance of Claim—Statute — Mistake—Appeal.——Construction of Massachusetts statute relative to insolvency, the allowance of claims against insolvent estates and the mode of correction by appeal or otherwise of mistakes in these matters.— *McKeown v. Gurney*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 312.

96. INSOLVENCY—Attachment—Cost—Statute.——The insolvency statutes of Connecticut abrogate pending attachments against the insolvent, but the attaching creditor shall be allowed all his costs accruing prior to the appointment of the trustee to be paid in preference to all other demands against the estate.—*Appeal of Emerson*, S. C. Err. Conn., Dec. 30, 1887; 14 Atl Rep. 295.

97. INSURANCE—Application—Increase of Risk—Levy. ——Where goods are levied on by a sheriff and are still in possession of the owner at the time he applies for an insurance upon them with other property, such levy is not an increase of the risk, which would compel the owner to make a disclosure of the fact to the insurance company.—*Niagara, etc. Co. v. Miller*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 385.

98. INSURANCE—By-laws—Condition — Reformation.— Where a policy of insurance contained a provision that the insurance was governed by the constitution and by-laws of the company, and to the policy was annexed a series of by-laws, entitled "conditions of insurance:" *Held*, that the insured was entitled to have the policy reformed so as to conform to those conditions.—*Miller v. Hillsborough, etc. Co.*, N. J. Ct. Err. and App., May 26, 1888; 14 Atl. Rep. 278.

99. INSURANCE — Foreign Companies — Constitutional Law—Statutes.——The statute of Indiana, regulating foreign insurance companies as to their dealings, deposits, taxation, etc., held to be constitutional, as it does not impose discriminating obligations.—*Blackmer v. Royal Ins. Co.*, S. C. Ind., June 22, 1888; 17 N. E. Rep. 580

100. INSURANCE—Tontine Policy—Equity — Trust.—— The relations of an insurance company to one holding a policy on the tontine plan is not that of trustee and *cestui que trust*, and equity cannot interpose upon that ground.—*Uhlman v. New York, etc. Co.*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 363.

101. INTOXICATING LIQUORS—Former Conviction—Evidence.——Upon an indictment for being a common

seller of intoxicating liquors, docket entries are sufficient evidence of a former conviction, unless a question of identity is raised.—*State v. O'Connell*, S. J. C. Me., April 2, 1888; 14 Atl. Rep. 291.

102. INTOXICATING LIQUORS—Instruction—Evidence.—Where there is circumstantial evidence tending to show that a charge in an account was for intoxicating liquors, it is not error for the court to refuse to instruct the jury that the plaintiff could recover for that item.—*Barrett v. Delano*, S. J. C. Me., March 16, 1888; 14 Atl. Rep. 288.

103. INTOXICATING LIQUORS—Screens.——The Michigan law, requiring that at times, when places where liquor is sold must be kept closed, curtains, etc., obstructing the view from the street shall be removed, is constitutional.—*Robison v. Hang*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 668.

104. INTOXICATING LIQUORS — Statutes — Repeal.—— Construction of Indiana statutes relative to the unlawful sale of intoxicating liquors. The statute giving damages for selling such liquors to an intoxicated person is not repealed by a subsequent statute prescribing punishment and penalties for that offense.—*Mulcahy v. Givens*, S. C. Ind., June 22, 1888; 17 N. E. Rep. 598.

105. JAIL—What Constitutes— Escape.——On a trial for carrying instruments into a jail to assist a prisoner in escaping, it appeared that they were carried inside a wall which was constructed around the house in which the prisoners were confined: *Held* that, under Texas law, it was for the jury to decide whether such inclosure between the house and wall constituted a part of the jail.—*Welch v. State*, Tex. Ct. App., June 9, 1888; 8 S. W. Rep. 657.

106. JUDGMENT—Deceased Defendant—Collateral Attack.——In an action of ejectment, pending at the time of the adoption of the North Carolina code, the plaintiff took judgment against defendant, not knowing that he was then dead: *Held*, that the judgment could not be collaterally attacked in a suit to enjoin its enforcement, but the proper remedy was by motion in the original action.—*Knott v. Taylor*, S. C. N. Car., May 31, 1888; 6 S. E. Rep. 788.

107. JUDGMENT—Execution—Decedent.——A creditor may issue an execution on a judgment after the lapse of the period fixed by statute against the estate of a decedent, though he has presented the judgment in the probate court as a claim against the estate.—*Fowler v. Mickley*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 634.

108. JUDGMENT—Mistake—Amendment.—— When the opinion of the appellate court shows that it intended to reverse the judgment of the lower court, but through inadvertence the order at the end of the opinion was an affirmance, the appellate court may at a subsequent term enter its judgment correctly *nunc pro tunc*.—*Cook v. Moore*, S. C. N. Car., May 28, 1888; 6 S. E. Rep. 795.

109. JUDGMENT—Rendition—Entry — Mistake—Appeal. ——Where, by mistake, judgment is entered when the report comes in, instead of after the lapse of thirty days, no notice will be taken of the mistake upon appeal or writ of error.—*Pittsburg, etc. Co. v. Shaw*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 323.

110. JURY—Witness—Credibility. —— The credibility of a witness is a question for the jury, and the supreme court cannot interfere, although it may believe that the weight of evidence is with the other party.—*Waters v. Burgess*, S. C. Penn., May 25, 1888; 14 Atl. Rep. 398.

111. JUSTICE—Jurisdiction—Waiver of Tort.——In an action for trespassing on plaintiff's land and cutting timber, plaintiff cannot waive the tort and sue on contract, so as to give a justice jurisdiction in the case for an amount in excess of $50, under North Carolina law.—*Edwards v. Cowper*, S. C. N. Car., May 24, 1888; 6 S. E. Rep. 792.

112. JUSTICE—Bill of Exceptions—Impeachment.—— A certificate of a justice of the peace to the bill of exceptions, regular on its face, and bearing date within ten days after judgment, cannot be impeached by a certificate of the same justice, made more than a month thereafter, which sets forth the circumstances under which the original certificate was made.—*Fuller v. Champaign, etc. Co.*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 504.

113. JUSTICE—Judgment— Certiorari. —— *Certiorari* will lie to review proceedings had before a justice of the peace, when a transcript thereof has been filed in the circuit court and execution issued thereon from such court.—*Wedel v. Green*, S. C. Mich., June 15, 1888; 38 N. W. Rep. 638.

114. JUSTICES — Title to Land. —— In an action for trespass to land, when plaintiff's testimony shows that the *locus in quo* is a public highway, that he was not in possession, but owned the adjoining land, and when defendant does not admit the plaintiff's title, the justice of the peace must, under Michigan law, without further proceeding, certify the cause to the circuit court. —*Ostrom v. Potter*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 670.

115. LANDLORD AND TENANT — Improvements — Will—Parol Contract. —— Where plaintiff agreed with defendant that if the latter would go upon a certain tract of land, he (plaintiff) would devise it to him by his will, and would build a new house on the premises. Defendant took possession of the land, and repaired the old house but repudiated the whole contract upon learning that plaintiff's will was not in his favor. In a suit for rent defendant set up the improvements he had made as a set-off: *Held*, that the set-off could not be allowed. — *Hopkins v. Ratliff*, S. C. Ind., June 14, 1888; 17 N. E. Rep. 288.

116. LANDLORD AND TENANT — Rent—Recoupment.—— In an action for rent, the tenant may file a plea of recoupment, that plaintiff had promised to furnish him five acres of land and two good horses, which he had failed to furnish. — *Horton v. Miller*, S. C. Ala., May 22, 1888; 4 South. Rep. 370.

117. LIBEL—Indictment — Publication. —— An information for libel, which charges the defendant with writing, publishing and circulating a libel, is not fatally defective in failing to state the mode of publication. —*State v. Dowd*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 483.

118. LIBEL AND SLANDER — Mitigating Circumstances. ——In an action for libel, the fact that the publication was induced by passion caused by a previous provoking publication of the plaintiff, irrelevant to the subject of the libel, will not be considered in mitigation of damages where there has been time for hot blood to cool. — *Quinby v. Minnesota T. Co.* S. C. Minn., June 15, 1888; 38 N. W. Rep. 623.

119. LIMITATION—Appeal—Bond— Judgment. —— An action on appeal bond is not barred because the statute of limitations has run against the judgment appealed from.— *Steele v. Lovejoy*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 711.

120. LIMITATIONS—Rent—Deed. —— Under Michigan law, the period of limitation in an action of debt for rent reserved by deed is ten years. — *Stewart v. Sprague*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 673.

121. LOGS—Scaling—Averaging. —— Where logs were purchased to be scaled on the bank by the surveyor general, and the scale-bill as returned shows on its face that part of the logs were averaged, the presumption is that they were not actually surveyed, but estimated. — *Pratt v. Ducey*, S. C. Minn., June 12, 1888; 38 N. W. Rep. 611.

122. MALPRACTICE— Contributory Negligence. —— In an action for malpractice against a physician, the contributory negligence of the patient in not obeying the doctor's instructions is a proper defense. — *Lower v. Franks*, S. C. Ind., Jan. 17, 1888; 17 N. E. Rep. 630.

123. MANDAMUS—Chancery Case— Issues.—— The supreme court will not enter upon the investigation of the merits of the issues involved in a chancery case on a motion for a *mandamus* on the chancellor. — *Chesebro v. Circuit Judge*, S. C. Mich., June 20, 1888; 38 N. W. Rep. 658.

124. MANDAMUS — Error. —— A *mandamus* will lie to compel a judge to act but it will not lie to compel him

to act in a particular manner nor if he has acted to reverse his decision, howsoever erroneous it may be. — *Commonwealth v. McLaughlin*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 377.

125. MASTER AND SERVANT — Incompetent Fellow-servant.—— A servant, who has been promised by the master that an incompetent fellow-servant will be removed, may remain for a time in the service without being conclusively chargeable as a matter of law with contributory negligence, even though without such promise he would have been so chargeable. — *Lyberg v. Northern P. R. R.*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 632.

126. MASTER AND SERVANT—Negligence. ——A longshore-man who was injured by the fall of a platform attached to a vessel on which he was at work cannot obtain damages from his employer, if it appears by the evidence that it was the duty of the longshore-men to keep the platform in order.—*Hudson v. Ocean, etc. Co.*, N. Y. Ct. App., June 5, 1888; 17 N. E. Rep. 342.

127. MASTER AND SERVANT — Railroad Companies — Bridges— Damages — Personal Injuries. —— Circumstances stated under which a breakman in the service of a railroad company was held entitled to recover from the company damages for personal injuries sustained by him in its service. — *Louisville, etc. Co. v. Wright*, S. C. Ind., June 20, 1888; 17 N. E. Rep. 584.

128. MECHANIC'S LIEN—Building—Statute.——A boiler-house, tool-house, etc., appurtenant to an "oil refinery," are "buildings" subject to a mechanic's lien, under the statute of Pennsylvania. — *Short v. Miller*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 374.

129. MORTGAGE—Foreclosure—Evidence. ——Circumstances stated under which it was held that the failure to produce an agreement referred to in a mortgage and collateral to it, or to make proof of its purport and provisions, did not defeat a foreclosure of the mortgage. — *Marshall v. Keller*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 362.

130. MORTGAGE—Mines— Royalty — Bankruptcy. —— The mortgagee of land, of which the chief value is the coal beneath the surface, is entitled to the royalty accruing under a lease of the coal mines as against the assignee in bankruptcy, the mortgage being prior in date to the bankruptcy.—*Appeal of Duff*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 364.

131. MORTGAGE—Power of Sale—Agent. —— A sale of land under a power in a mortgage by an agent of the mortgagee, who bids in the land as agent for a third party, is voidable. — *Gibson v. Barber*, S. C. Car., May 22, 1888; 6 S. E. Rep. 766.

132. MORTGAGE — Resignation — Chattel Mortgage — Lien.——Where one sells an engine and takes a chattel mortgage thereon, which he fails to register, and the purchaser annexes the engine to a freehold which he has already mortgaged, the holder of the chattel mortgage is entitled to be protected in his lien on the engine so far as it does not diminish the security which the mortgagee of the land had upon the premises before the engine was placed upon them. — *Campbell v. Roddy*, N. J. Ct. Err. & App., May 26, 1888; 14 Atl. Rep. 279.

133. MORTGAGE — Release — Surety. —— Though a surety has satisfied his principal's debt, he may enforce a mortgage given to save him harmless by reason of his suretyship.—*Knight v. Rountree*, S. C. N. Car., May 19, 1888; 6 S. E. Rep. 762.

134. MUNICIPAL CORPORATIONS — Damages — Limitations.—— A statute limiting actions against a city for damages from a defect in the condition of any bridge, street, sidewalk, or thoroughfare, is not applicable to a case of land overflowed by the obstruction of a watercourse by raising the grade of a city street.— *Pye v. City of Mankato*, S. C. Minn., June 15, 1888; 38 N. W. Rep. 621.

135. MUNICIPAL COURTS — Concealed Weapons. —— The recorder's court of the city of Detroit has no jurisdiction in cases for carrying concealed weapons, under Michigan laws, 1887, act 129.— *Robison v. Judge of Court*, S. C. Mich., April 25, 1888; 38 N. W. Rep. 654.

136. NEGLIGENCE—Contributory Negligence. ——Circumstances stated in which it was held that the plaintiff, an employee of defendants and suing for personal injuries, was not guilty of contributory negligence. — *Woodward v. Shumpp*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 378.

137. NEGLIGENCE — Dangerous Premises — Ordinance. —— In a suit by A against B and a city for injuries received from falling into a hole dug into the street by B, the city ordinance, requiring such excavations to be properly guarded, is admissible to show the degree of defendant's negligence, though their liability is not based on such ordinance. — *Flater v. Fey*, S. C. Mich., June 15, 1888; 38 N. W. Rep. 656.

138. NEGLIGENCE— Master and Servant. —— Circumstances stated under which it was held in an action by a servant against his master for personal injuries, that no negligence was proved and that the trial court should have directed a nonsuit. — *Pittston, etc. Co. v. McNulty*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 387.

139. NEW TRIAL—Verdict against Evidence.——A verdict will not be set aside when the evidence reported does not satisfy the law court that it is clearly wrong.— *Frost v. Wood*, S. J. C. Me., April 2, 1888; 14 Atl. Rep. 290.

140. NEW TRIAL—Verdict against Evidence. ——A new trial will not be granted by the law court on the ground that the verdict is against the evidence, unless the verdict is so clearly unsupported as to require it. —*Lewis v. Hersey*, S. J. C. Me., April 2, 1888; 14 Atl. Rep. 290.

141. PARTIES—Cestiu Que Trust—Corporation.——In an action against a corporation as trustee in a deed of trust to have it set aside as fraudulent, the *cestiu que trust* need not be made a party defendant, when it is a foreign corporation outside of the jurisdiction of the court, and its property has been assigned to such trustee, and the stockholders of the two corporations are mainly the same persons. — *Silver V. M. Co. v. Baltimore, etc. Co.*, S. C. N. Car., May 26, 1888; 6 S. E. Rep. 735.

142 PARTY WALLS—Agreement—Lateral Support. —— Where the owner of a wall and an adjoining proprietor have made a written agreement for the joint use and repair of a wall for a valuable consideration, though not under seal, and both parties have acted under the agreement, the owner of the soil on which it stands, or his successors, cannot remove the soil adjacent to it without being accountable to the adjoining proprietor for the consequences. — *Hammond v. Schiff*, S. C. N. Car., May 26, 1888; 6 S. E. Rep. 753.

143. PATENTS—Assignment—Single Claim. —— A patentee may assign a single claim of a patent and as to that reserve a shop right; such assignment carries with it a right to the assignee to maintain a bill for an infringement of such claim. — *Pope M. Co. v. Gormully R. I. M. Co.* U. S. C. C. (Ill.), April 30, 1888; 34 Fed. Rep 893.

144. PATENTS — Telephones. —— Defendant's instruments, which produce electrical changes co. responding to the vibrations of sound waves caused by the articulate speech, must be held to be an infringement of the Bell patent.—*American B. Co. v. Southern T. Co.*, U. S. C. C. (Ark.), April 21, 1888; 34 Fed. Rep. 795.

145. PATENTS—Velocipedes — Bicycles. —— Limiting some patents for bicycles and velocipedes and holding others void.—*Pope M. Co. v. Gormully & J. M. Co.*, U. S. C. C. (Ill.), April 30, 1888; 34 Fed, Rep. 885.

146. PATENTS — Velocipede-seats. —— The second claim of patent 216,371 of June 3, 1878, for velocipedes, is void. The first claim of patent 314,142 to Thomas B. Kirpatrick for a bicycle saddle must be restricted to the special device for the bifurcated forward springs, which are carried beyond the steering head. — *Pope M. Co. v. Gormully & J. M. Co.* U. S. C. C. (Ill.), April 30, 1888; 34 Fed. Rep. 893.

147. PAYMENT— Agency. —— The fact that money is deposited by the debtor with the agent of the creditor, does not of itself constitute a payment to that amount, there must be some further act indicating the intent that the money shall be applied to the payment of the debt. — *Cavanaugh Buehler*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 391.

148. PERSONAL INJURIES—Damages — Evidence. —— Evidence is admissible, in an action for personal injuries, to show the existence of Bright's disease at the time of the trial, which was caused by those injuries, and formed an element of the damages to be awarded to the plaintiff. — *Ohio, etc. Co. v. Hecht*, S. C. Ind., June 16, 1888; 17 N. E. Rep. 207.

149. PLEADING— Answer — Denial. —— A general denial in an answer of all allegations, not expressly admitted or denied, is inapplicable to a subject as to which specific answer is made.— *Davenport v. Ladd*, S. C. Minn., June 15, 1888; 38 N. W. Rep. 622.

150. PLEADING—Contributory Negligence—Waiver.—— Though in an action for damages for injuries the defendant has set up contributory negligence, yet he may waive the submission of the question and consent that the case may go to the jury upon other issues. — *De Berry v. Carolina C. R. R.*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 723.

151. PLEADING — Vendor and Vendee — Consideration. —— Where an action on a note given for land was brought, a plea that the plaintiff had failed to convey the land was made, and a replication that the plaintiff had not refused to convey was held to be bad.—*Boweland v. Gibson*, S. C., Ill., May 9, 1888; 17 N. E. Rep. 319.

152. PLEDGE—Pledgee—Notice—Evidence —— Where the evidence showed that bonds were deposited with a broker and that he hypothecated bonds of the same issue with the defendant bank as a security for a loan: *Held*, that the evidence did not show that the plaintiff's bonds were among those hypothecated, or that defendant had notice that plaintiff had deposited bonds with the broker, the plaintiff could not recover. — *Appeal of Klien*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 369.

153. PLEDGE—Rights of Piegee. —— The holder of an accommodation note, indorsed to him as collateral security, can recover against the accommodation maker no more than the amount intended to be thereby secured.— *Handy v. Sibley*, S. C. Ohio, May 22, 1888; 17 N. E. Rep. 329.

154. POOR AND POOR LAWS—Insane Person— Contract. —— Construction of the poor laws of Maine and of a contract for supporting in the State lunatic asylum insane paupers sent there from the city of Belfast.—*Hayford v. Belfast*, S. J. C. Me., March 15, 1888; 14 Atl. Rep. 287.

155. POST-OFFICE— Mailing Obsence Matter — Indictment.——An indictment charged defendant with mailing a certain obscene paper, called Lucifer, which paper was so obscene as to dispense with the incorporation of the words and figures in the indictment: *Held*, that the paper was not sufficiently identified. — *U. S. v. Harmon*, U. S. D. C. (Kan.), May 1, 1888; 34 Fed. Rep. 872.

156. PRACTICE—Abatement—Arbitration. —— A mere executory agreement to arbitrate, entered into by parties to a proceeding to recover damages to land resulting from the construction of a railroad, does not abate the suit or work a discontinuance.—*Laflin v. Chicago, etc. R. R.*, U. S. C. C. (Wis.), Dec. 10, 1887; 34 Fed. Rep. 859.

157. PRACTICE—New Trial — Paying Costs.—— When plaintiff in an action for the possession of land, after a judgment for defendant and before the next term pays all the costs, he is entitled to a new trial, under Colorado law, and the delay of the court in acting on his motion for a new trial does not defeat his right. — *Keener v. Union P. R. R.*, U. S. C. C. (Colo.), May 7, 1888; 34 Fed. Rep. 871.

158. PRACTICE — Notices — Service. —— Under North Carolina law, a notice of an exception to an appraisement of property claimed as exempt from execution is insufficient when sent through the mails, and a motion for the issuance of *alias* notices is properly refused. — *Allen v. Strickland*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 780.

159. PRACTICE— Party in Default — Discretion. —— A defendant obtained leave to file an answer in a certain time. He filed a motion to make the petition more definite and certain, which was stricken from the docket. The appellate court will not reverse the case. — *Missouri P. R. R. v. Linson*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 498.

160. PRACTICE—Trial—Credit of Witnesses. ——When counsel in their speeches have referred to the interest of witnesses, it is not error to instruct the jury that if the interest or employment of a witness has been impaired or biassed his judgment, such fact may be considered by them in weighing the value of his testimony.— *McDonell v. Rifle B. Co.*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 681.

161. PRINCIPAL AND AGENT — Proof of Agency —— Proof merely that one is acting for another is not proof of authority. — *Walsh v. Culbertson*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 631.

162. PRINCIPAL AND SURETY — Liability of Surety — Notice. —— A surety, against whom with the principal a judgment has been obtained, is not discharged by failure of the plaintiff to levy an execution on the principal's land, who has since become insolvent, unless the surety requested him in writing to take such action, under North Carolina law.—*First N. Bank v. Homesley*, S. C. Car., May 22, 1888; 6 S. E. Rep. 797.

163. PUBLIC LANDS—Determining Titles— Courts.—— The question of determining whether certain land is open for settlement, or whether it has passed under a railroad grant, is for the officers of the land department, and the courts cannot interfere by injunction or otherwise. — *Sioux City, etc. R. R. v. U. S.*, U. S. C. C. (Iowa.), May Term, 1888; 34 Fed. Rep. 835.

164. PUBLIC LANDS—Licenses to Railroads. ——When a railroad has the right to take timber from the public lands adjacent to its right of way, to use for purposes of construction, it can take timber so obtained to any point of the line. The Denver & R. G. R. R., can take no timber from the public lands for the repair of any portion of its track not completed before June 2, 1882, and for that portion only from the lands adjacent thereto.—*Denver and R. G. R. R. v. U. S.*, U. S. C. C. (Colo.), May 16, 1888; 34 Fed. Rep. 838.

165. QUIETING TITLE — Pleading — Complaint. —— A complaint which shows that plaintiff had bought the land and paid for it and received a warranty deed, that the defendant held possession claiming that the deed was a mortgage, and praying for the quieting of his title, is a good complaint. — *Rogers v. Beach*, S. C. Ind., July 10, 1888; 17 N. E. Rep. 609.

166. QUIETING TITLE—Possession. —— One in possession of real estate cannot maintain an action to quiet his title thereto against a person holding the legal title and a claim for a portion of the purchase money therefor.—*Northrop v. Andrews*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 510.

167. RAILROADS—Bonds— Exchange. —— Where provision is made for retiring a series of secured income bonds of a railroad and issuing new bonds in exchange, a bondholder, who does not consent thereto, is not entitled in an accounting under the mortgage to claim for interest due him more of the income than his share would have been had no bonds been surrendered. — *Barry v. Missouri, etc. R. R.* U. S. C. C. (N. Y.), May 12, 1888; 34 Fed. Rep. 829.

168. RAILROAD COMPANY— Crossing.——Where a railroad company uses a street of a city as part of its tract, and has switches upon it for moving its cars to and fro, it is bound to use extraordinary diligence to prevent accidents and disasters to persons who may cross such street. — *Cleveland, etc. Co. v. Schneider*, S. C. Ohio, May 1, 1888; 17 N. E. Rep. 321.

169. REMOVAL OF CAUSES —Time — Separable Controversy. —— The fact that the non-resident removing party has procured an order of the State court dismissing the cause set aside, and has noted the suit for trial, does not make an application for removal to the federal court too late. A suit to subject land taken in A's name to a judgment against B, on the ground that B paid the purchase price, is not supplementary to the original suit, and the case is removable.— *Kalamazoo W*

Co. v. Snavely, U. S. C. C. (Kan.), April 9, 1888; 34 Fed. Rep. 823.

170. REPLEVIN—Bond—Receiver. ——To an action on the redelivery bond of the defendant in a replevin suit, it is no defense that the property was delivered to a receiver appointed by the court in the replevin suit. Such defense was available in the replevin suit. — *Boyd v. Hufaker*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 508.

171. SALE—Delivery of Part— Action for Price. —— A purchaser of a specified quantity of goods may waive strict compliance with the contract and may accept part of the goods, and the price agreed to be paid, in the absence of other evidence, may be taken as the basis of estimating the seller's damages in an action for the price.— *Churchill v. Holton*, S. C. Minn., June 12, 1888; 38 N. W. Rep. 611.

172. SALE—Title—Identification—Delivery. ——A corporation before going into the hands of a receiver was paid for goods which were manufactured and were capable of identification, but they were not delivered before the receiver took possession: *Held*, that the sale was complete and the purchaser was entitled to a delivery of the goods. — *Bates v. Elmer, etc. Co.*, N. J. Ct. Chan., June 1, 1888; 14 Atl. Rep. 273.

173. SALE—Trees—Identification. —— A sold B by bill of sale nine walnut trees standing on his ground, which were marked at the time. The bill of sale was duly proved and recorded. A sold his land to C, who cut down the trees and removed them. B brought suit for their value: *Held*, that parol evidence was admissible to identify the trees, though there were more than nine walnut trees on the premises.— *Carpenter v. Fewell*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 785.

174. SET-OFF—Contract—Tort— Waiver. —— A set-off can only be allowed on demands growing out of contract, debt, or duty. The waiver of a tort cannot be allowed by way of set-off.—*Richey v. Bly*, S. C. Ind., June 15, 1888; 17 N. E. Rep. 296.

175. SET-OFF—Conversion—Debt. —— In an action of trover the defendant cannot set-off a debt due him from the plaintiff.—*Dole v. McGraw*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 686.

176. SHERIFFS—False Returns—Jurisdiction. —— The superior court has jurisdiction of an action against a sheriff for making a false return of civil process, under North Carolina law.—*Harrel v. Warren*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 777.

177. SPECIFIC PERFORMANCE — Evidence—Assignment. —— Circumstances stated under which the assignee of the purchaser of land was held to be entitled to a specific performance of the contract, the evidence showing that the articles upon which his claim was based had been duly delivered to him. — *Hutchinson v. Welsh*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 328.

178. STOCK-KILLING—Attorney's Fee. —— The Michigan act, authorizing the taxation of an attorney's fee against a railroad in case of a judgement against it for injuries to stock, occasioned by its failure to fence its track, is unconstitutional.—*Lafferty v. Chicago, etc. R. R.*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 660.

179. TAXATION—Mortgages. ——Under Michigan laws, mortgages are subject to assessment for taxation. It is not double taxation.—*People v. Board of Supervisors*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 639.

180. TAXATION—Payment of Taxes—Possession — Evidence. —— The payment of taxes on land is not evidence of possession or the rights to possession.—*Tillotson v. Prichard*, S. C. Vt., June 12, 1888; 14 Atl. Rep. 302.

181. TAXATION—Railroads—Logs Cut on Exempt Land. —— Logs cut for the purpose of sale by the Northern Pacific Railroad on its lands exempt from taxation, are subject to taxation. — *State v. Northern P. R. R.*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 635.

182. TAXATION — Taxable Property — Indictment — Statute.——Under the statute law of Indiana, a person who refuses to give a true list of his taxable property to the proper officer is indictable: *Held*, that if the defendant has only failed to report a particular item of taxable property he is not indictable. — *Durham v. State*, S. C. Ind., July 10, 1888; 17 N. E. Rep. 629.

183. TELEGRAMS—Delay—Speculation.—— A telegraph company will be held for only nominal damages for delay in transmitting a message, when the only damages proved are the loss of an opportunity to make a speculative bargain.— *Cannons v. Western U. T. Co.*, S. C. N. Car., May 28, 1888; 6 S. E. Rep. 731.

184. TRADE-MARK — Injunction. —— Le Page manufactured liquor glue and used the trade-mark "Le Page's Liquor Glue;" he sold out his business including the trade-mark to a corporation: *Held*, that the corporation could not enjoin Le Page from making liquor glue but could enjoin him from selling it as "Le Page's Liquor Glue," or describing the firm in which he acted as "The Le Page Liquor Glue Company."—*Russia, etc. Co. v. Le Page*, S. J. C. Mass., June 19, 1888; 17 N. E. Rep. 304.

185. TRIAL—Instruction— Negligence — Personal Injuries.——In a trial for personal injuries sustained by a collision with a beer wagon the court properly refused to charge that, "if the jury believed that at the time of the alleged accident the defendant's driver was traveling in an ordinary manner, the defendant is not liable for an injury resulting from the use of the public street." — *Schmidt v. Magill*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 383.

186. TRIAL—Interrogatories. —— Where relevant interrogatories have been submitted to the jury, and the jury have returned a general verdict without answering them, the court cannot allow the interrogatories to be withdrawn by the party proposing them and dismiss the jury, against the objection of the opposite party.—*Duesterberg v. State*, S. C. Ind., June 28, 1888; 17 N. E. Rep. 624.

187. TROVER AND CONVERSION — Pleading — Evidence. ——In an action for the conversion of personal property, wherein the complaint alleges title in the plaintiff, which is denied in the answer, though plaintiff claims title through a sale by defendant, the defendant may show fraud to avoid the sale and its rescission. — *Johnson v. Oswald*, S. C. Minn., June 18, 1888; 38 N. W. Rep. 630.

188. TRUSTS — Estate — Incumbering. —— Land was devised to A in trust for B and C, A representing that the claims of certain heirs of the devisor must be made. B, who had purchased C's interest, mortgaged the land, C and A signing the mortgage as witnesses: *Held*, that under Michigan law the mortgage was void as to both B and A. — *Weaver v. Van Akin*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 677.

189. TRUSTS — Resulting — Guardian and Ward. —— Where a guardian purchases property in his own name, principally with his ward's money but partly with his own, a trust results in favor of the ward, who may claim not merely a lien as security for the money but a proportionate share of the estate. — *Bitzer v. Bobo*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 609.

190. VENDOR AND VENDEE—Evidence—Jury. —— Circumstances stated under which it was held that where there was conflicting evidence as to the representations made by the vendee, as to the title of a lot which he was to pay in part to the vendor in consideration for his land: *Held*, that it was a question for the jury what those representations were and what was the real state of the title to the lot.— *Freed v. Richey*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 347.

191. VENUE—Bond—Administrator. —— Under North Carolina law, an action on an administrator's bond is properly brought in the county where plaintiff resides and where the bond was given, although the defendants reside in another county. — *Clark v. Peebles*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 798.

192. WILLS—Appeal. —— An appeal lies from a decision of the probate court refusing to admit a will to probate. — *Lawrie v. Lawrie*, S. C. ,Kan., June 9, 1888; 18 Pac. Rep. 499.

193. WILL—Construction.—— Where a testator in his will says "that he is informed that by the laws of the

State his widow is entitled to the possession of one-third of his personalty and a life interest is one-third of his lands, and confirms that disposition: *Held*, that under the will the widow takes one-third of the personal property absolutely and a life interest is one-third of his land. — *Woodford's, etc. v. Woodford*, N. J. Ct. Chan., May 26, 1888; 14 Atl. Rep. 273.

194. WILL—Construction. —— Where a testator by his will gives to his wife all his property and directs that what is left at her death shall be divided among his heirs: *Held*, that she had the power to assign without consideration a note due to the testator, and that his administrator with the will annexed could not claim the note. — *Tower v. Hartford*, S. C. Ind., June 13, 1888; 17 N. E. Rep. 281.

195. WILL—Construction—Heir—Description. ——If a devise is made to an "heir, heir at law, right heir," and when the will takes effect there is such a person answering this description, no other person can take under the devise unless it is clearly so indicated in the will.—*Mason v. Bailey*, Del. Ct. Chan, March 27, 1888; 14 Atl. Rep. 309.

196. WILLS — Construction — Intention. —— When a clause in a will provides in general terms for the limitation over of the devise to a second taker upon a contingent event, the intention of the testator, as indicated by all the parts of the will, must determine when and under what particular circumstances the contingency arises.—*Shadden v. Hembree*, S. C. Oreg., May 14, 1888; 18 Pac. Rep. 572.

197. WILL—Construstion — Shelley's Case. —— A will provided, that "I lend unto my son all my land after the death of his mother, and, if he hath a lawful heir begotten of his body at his death, I give it to said heir or heirs; and if he dies without an heir as aforesaid, I lend it to S: *Held*, that the son took merely a life-estate. — *Howell v. Knight*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 721.

198. WILL—Deed—Delivery — Assessment — Taxation. —— Where by her will a testatrix states that many years before she had conveyed her land to her sister by a deed which had not been delivered, and upon her death the deed was found to be in her possession: *Held*, that for assessment and taxation purposes the deed was not delivered until after the death of the testatrix. — *Appeal of Davenport*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 346.

199. WILL—Undue Influence—Capacity. —— Circumstances stated under which it was held that there was not sufficient evidence of undue influence over the testatrix or of want of capacity on her part to invalidate her will. — *Wheeler v. Whipple*, N. J. Perog. Ct., May 25, 1888; 14 Atl. Rep. 275.

200. WITNESS—Waiver—Insurance Policy. —— When the law of Missouri, prohibiting a physician from testifying as to any information obtained from a patient while visiting him professionally, is waived in a policy of insurance, such waiver is binding on the beneficiary. —*Adreveno v. Mutual R. F. L. Ass.*, U. S. C. C. (Mo.), April 23, 1888; 34 Fed. Rep. 870.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In the current volume, No. 4, page 81, you comment upon the act of the Ohio legislature in avoiding the constitutional inhibition of special legislation by making a certain law applicable only to the towns of given population. There seems to be a growing tendency upon the part of legislators to thus favor localities desiring some special privilege. The constitution of Illinois contains substantially the same prohibition, and the legislature of that State has for years avoided it by enacting that the law shall apply only to cities or counties of a specified population. So far the question there has not been tested within my knowledge. The forty-ninth congress at its first session passed an act to prohibit special legislation in the territories, etc. Session Laws U. S. 1885 and 1886, ch. 818, page 170. Among other things prohibited to be done by local or special laws, is locating or changing county seats and the opening or conducting of any election or designating the place of voting, the intention clearly being that all laws should operate alike in any territory. At the sixteenth session of the legislative assembly of the Territory of Dakota, a certain locality having failed to remove the county seat of its county by vote under the general law, and like the Ohio town "wanting it bad," secured the passage of a law providing "that all counties having a population not less than 12,000, as shown by the census of 1885, and having an area of not less than 48 congressional townships," where the county seat has been located under certain laws, etc., may hold a special election on a specified day, providing all the formula of voting and canvassing, and locating the county seat where a majority of the votes cast shall select, instead of by two-thirds as provided by general law. The act might as well designate the county by name, as but one county in the Territory answers its requirements. This is but one of several similar acts by the same assembly, showing the intention to accomplish indirectly what may not be done by direct legislation, and an examination of the acts of other Territories shows the same state of affairs. The writer is not a resident of the county indicated, has no personal interest in its affairs, and only mentions the act to emphasize the thought that it is time for the courts to call a halt in this kind of legislation.

NEMO.

RECENT PUBLICATIONS.

A MANUAL FOR NOTARIES PUBLIC, General Conveyancers, Commissioners, Justices, Mayors, Consuls, etc., as to Acknowledgments, Affidavits, Depositions, Oaths, Proofs, Protests, etc., for each State and Territory, with Forms and Instructions. By Florien Giauque, of the Cincinnati, O., Bar, author of "A Manual for Assignees," "A Manual for Guardians," "Election Laws of the United States," joint author of "Dower and Curtesy and other Life Tales," etc. Cincinnati: Robert Clarke & Co., 1888.

This is a little volume which will no doubt prove exceedingly useful to the classes of official persons for whose use it is especially designed, and may well find a place in the offices of general practitioners, who will often find it useful for reference. The author is a well-known gentleman of extensive experience in authorship, especially of works like the one before us. The work has manifestly been prepared with great care and is well arranged, and in all respects worthy of the favorable consideration of the official persons to whom it is especially addressed and of the profession generally.